TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914 1915

No. 374 78

GUERINI STONE COMPANY, PLAINTIFF IN ERROR,

vs.

P. J. CARLIN CONSTRUCTION COMPANY.

~~No. 375.~~

~~[redacted]~~

~~ERROR,~~

vs.

~~[redacted]~~

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

FILED FEBRUARY 27, 1914.

(24,072)

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GUERINI STONE COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

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1 In the District Court of the United States for Porto Rico.

(Filed January 27th, 1913.)

GUERINI STONE COMPANY, Plaintiff,
vs.
P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

Præcipe for Record.

To Rafael Guillermety, Esq., Clerk of the District Court of the United States for the District of Porto Rico, San Juan, P. R.:

Please make and certify copies of the following papers on file in your office, to be used as part of the record on writ of error in this cause, before the Supreme Court of the United States;

Complaint,
Answer,
Amendment to complaint filed Nov. 2nd, 1912,
Amended bill of particulars filed Nov. 9th, 1912,
Amendment to Complaint filed Nov. 13th, 1912,
Journal entry containing and including the verdict on the trial of this cause,
Judgment,
Plaintiff's petition for writ of error,
Order allowing plaintiff's writ of error, and fixing bond,
Writ of Error,
Plaintiff's bond on writ of error,
Plaintiff's Citation,
Plaintiff's bill of exceptions,
Stipulation extending time to file record with the Supreme Court filed Jan. 17th, 1913,
This Præcipe.

Respectfully yours,
(Signed) E. S. PAINE,
Attorney for Plaintiff.

San Juan, P. R., January 27th, 1913.

2 In the District Court of the United States for Porto Rico.

Filed November 13, 1913.

Law. No. 891.

GUERINI STONE COMPANY, Plaintiff,
vs.
P. J. CARLIN CONSTRUCTION COMPANY, Defendant

Præcipe.

The Clerk of the District Court of the United States for Porto Rico.

SIR: Please include in the record on appeal in this cause correct copies of the following papers:

1. Stipulation. Order entered June 19th, nunc pro tunc, as of February 28, 1913, extending time for filing and settling the bill of exceptions and filing the record in the Supreme Court of the United States.

2. Order entered July 1st extending the time for filing and settling the bill of exceptions and for filing the record in the Supreme Court of the United States.

3. Order entered September 30th, 1913, extending the time for filing and settling the bill of exceptions and for filing the record in the Supreme Court of the United States.

4. Entry made November 11th, 1913, upon the stipulation of counsel in open court that all extensions for time for filing and settling the bill of exceptions and for filing the record in the Supreme Court of the United States had been duly and validly made, and the order of the same date that the Honorable Judge
3 of this Court is the Successor to Honorable Paul Charlton, the Judge before whom this cause was tried.

5. This Præcipe.

Yours, etc.,

(Signed) FRANCIS E. NEAGLE,
Attorney for Guerini Stone Co.

San Juan, P. R., November 13th, 1913.

4 In the District Court of the United States for Porto Rico.

(Filed June 18th, 1912.)

Law. No. —.

GUERINI STONE COMPANY, Plaintiff,
vs.
P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

Complaint.

The plaintiff above named, by its attorney, E. S. Paine, Esq., complaining of the defendant alleges;

1. That the plaintiff is a corporation duly organized under and existing by virtue of the laws of the State of Massachusetts, and on information and belief that the defendant is a corporation duly authorized under and existing by virtue of the Laws of the State of New York.

2. That this defendant under date of December 16th, 1910, in the City of New York, State of New York, entered into a contract in writing with one A. Guerini, then doing business under the firm name of Guerini Stone Company, by which contract, said Guerini Stone Company obligated itself to do certain work and to furnish the labor, materials and supplies necessary for said work, as more fully set forth in said contract on the so-called Federal Building
5 which was to be constructed in San Juan, Porto Rico, and whereby the said P. J. Carlin Construction Company agreed

to employ the Guerini Stone Company in doing said work, and to make payment therefor as more fully set forth in said contract, a copy of which contract is attached to this complaint and hereby made a part thereof.

3. That thereafter, plaintiff corporation was organized under the Laws of the State of Massachusetts under the name of Guerini Stone Company, and that thereafter, said contract was duly assigned to this plaintiff and that this defendant thereupon consented in writing to said assignment and thereafter always recognized this plaintiff as the other party to the contract referred to.

4. That thereafter, during the month of February, 1911, at defendant's request, and in pursuance of the terms of said contract, this plaintiff employed and sent to Porto Rico its representatives, brought laborers from the United States and employed others in Porto Rico, organized its working forces, purchased and supplied the necessary tools and materials, and prepared itself and was ready and willing to perform each and every obligation imposed on it by the terms of said contract.

5. That thereafter, until the 16th day of October, 1911, this plaintiff was not permitted by this defendant to proceed with the work provided for by this contract owing to defendant's failure to provide the granite blocks necessary therefor. That on said day this plaintiff did proceed with said work with all possible diligence and performed all the work provided for by said contract as fast as
6 this defendant in the course of construction work permitted this plaintiff to do so, and that this plaintiff duly complied with each and every obligation on it imposed by the terms of said contract.

6. That notwithstanding the entire readiness and preparedness of this complainant to proceed with its work, nevertheless, during the period from the 16th day of October, 1911, to the 9th day of March, 1912, the work under the contract was unreasonably and unjustifiably delayed by the inexcusable default and failure of this defendant to provide necessary materials and to carry on its part of the construction work of said building, so as to permit of this plaintiffs performing the construction work required of it under the contract. And that plaintiff was thereby caused great damage by reason of continuous delay and interruption in its work. That during said period, owing to defendant's defaults as above set forth, plaintiff was only able to work intermittently, and was unreasonably hindered and delayed, although plaintiff was at all times anxious and willing to proceed with all diligence and without interruption, all to the great damage of plaintiff, and in breach of defendant's obligations under said contract.

7. That on the 9th day of March, 1912, owing to the inexcusable default and failure of defendant to properly carry on its part of said contract, and owing to the inexcusable default and failure of this defendant to properly construct the foundation and other works in its charge, and to furnish and provide necessary material, all work of every nature was stopped on said building, and this plain-

tiff was prevented by defendant from continuing with any
7 work whatsoever, and that said stopping of work has continued ever since, is still continuing, and, as plaintiff is informed and believes, will continue for a perod of at least several months hereafter, and that defendant has accordngly failed to comply with the obligations imposed on it by the contract herein set forth, and has committed a breach of its obligations under the same, and that the result of said failure to comply with the terms of said contract has been, and is, to cause great damage and loss to this plaintiff, which has been obliged to keep its labor force on hand during all of said period at great loss and expense to plaintiff, and with the result that plaintiff cannot now continue with the work provided for it under the contract except at a great loss and damage, and that it will be impossible to complete the work provided for in said contract within the time set by its terms, nor within any reasonable extension of said time, nor within two years from this date.

8. Although plaintiff has always been ready and willing to comply with said contract the defendant has failed and refused as aforesaid to permit it so to do.

9. That plaintiff has well and properly performed under the terms of said contract, a large amount of work, and has done all of said work which defendant has permitted it to do or that could be done at the stage of construction reached by the defendant in the work done by it, and that by the terms of said contract, payment of not more than 85% of the amount of the work actually done was due and payable by this defendant monthly on twelve days' notice
from plaintiff to defendant, and that plaintiff during the
8 months of December, 1911, January and February, 1912, duly notified and demanded of defendant payment in accordance with the contract of the sums due for the work actually performed, but that the defendant has continuously and repeatedly failed and refused to make said payments and accordingly, has committed a breach of its obligations under the terms of the contract.

10. That under date of May 22nd, 1912, plaintiff notified defendant in writing of its election to cancel or rescind said contract and to bring its action for damages for breach thereof.

11. That plaintiff heretofore has offered to the defendant to submit the differences arising out of the facts herein set forth to arbitration, but that defendant has always refused so to do.

12. That plaintiff, at defendant's request has furnished and supplied work, labor and materials in and about the construction of the Federal Building at San Juan, Porto Rico, of the fair reasonable and agreed value of $45,237.00, which sum has been duly demanded of defendant and no part of which has been paid, except the sum of $4,439.55, and that defendant is justly indebted to plaintiff in the sum of $40,797.45.

13. That plaintiff has been damaged in the sum of $35,525.00, which amount has been actually expended by it to date in and about the furnishing of work, labor and material provided for by said

contract, and has been damaged in the additional sum of $5,000.00 by reason of loss of time, waste of material and damage to equipment caused by the delay above set forth, and that plaintiff has also been damaged in the sum of $9,712.00, the same being the amount of profits which plaintiff would have made if defend-
9 ant had complied with the terms of its contract, and that no part thereof has been paid by defendant to date, except the sum of $4,439.55.

Wherefore, plaintiff demands judgment against the defendant in the sum of $50,237.00, together with interest thereon from the date of filing this action, together with the costs of this action.

(Signed) E. S. PAINE,
Attorney for Plaintiff.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

George Follett, being duly sworn deposes and says that he is the manager and attorney in fact of plaintiff corporation in Porto Rico, that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he be- it to be true.

(Signed) GEORGE FOLLETT.

Sworn to and subscribed before me this 18 day of June, 1912, by George Follett, of age, married, resident of San Juan, by occupation agent, to me personally known.

[SEAL.] RAFAEL GUILLERMETY,
Clerk Dist. Court of U. S. for P. R.,
(Signed) By N. V. COLBURN, *Deputy.*

File No. —.

10 In the District Court of the United States for Porto Rico,
Sitting at San Juan.

Filed July 29, 1912.

GUERINI STONE COMPANY, Complainant,
vs.
P. J. CARLIN CONSTRUCTION CO., Defendant.

Answer.

Defendant, P. J. Carlin Construction Company, by its Attorney Francis H. Dexter, for answer to the complaint herein filed says:

(1) It admits that plaintiff and defendant are corporations organized and existing respectively in the manner described in the complaint herein.

(2) Defendant admits the execution of the contract by and be-

tween A. Guerini and defendant on the 16th day of December, 1910, as in the said complaint alleged, and for greater certainty as to the contents thereof defendant refers to the original copy thereof which is made a part of this answer.

(3) Defendant admits the assignment of said contract by said A. Guerini to plaintiff and the consent of defendant thereto as in the third paragraph of the complaint alleged.

(4) Defendant admits that during the month of February, 1911, plaintiff did employ and send to Porto Rico, certain of its representatives and laborers and that plaintiff employed some other laborers in Porto Rico, purchasing and supplying certain tools and materials for the performance of the obligations assumed by said plaintiff in and by the contract above referred to.

11 (5) Defendant specifically denies that after the month of February, 1911, and until the 16th day of October, 1911, plaintiff was prevented by defendant from proceeding with, and carrying on the work provided for by said contract owing to defendant's failure to provide granite blocks, or for any other reason, and defendant denies that plaintiff proceeded with the performance of the work provided for in and by said contract, and denies that plaintiff has complied with the terms of said contract as alleged in paragraph 5, or at all.

(6) Defendant specifically denies that during the period from the 16th of October, 1911, to the 9th of March, 1912, the work under the said contract was unreasonably and unjustly delayed by the inexcusable default and failure of defendant to provide necessary materials, and to carry on its part of the construction work of said building, and defendant denies that plaintiff has been caused damage by reason of continuous delay and interruption in its work, or for any other reason in connection with the things to be done and performed under the said contract.

(7) Defendant specifically denies that on the 9th of March, 1911, or at any other time the work on said building was stopped on account of the inexcusable default and failure of defendant to properly construct a foundation and other works in charge of defendant or to furnish and provide necessary materials, and defendant specifically denies that the said work will be delayed for several months because of said alleged inexcusable default and failure of defendant, and defendant further specifically denies that it has committed any breach of its obligations in the contract aforesaid, or that plaintiff has been damaged by reason thereof.

(8) Defendant denies that plaintiff has at any time since
12 the execution of said contract been ready and willing to comply with the terms thereof.

(9) Defendant specifically denies that plaintiff has done or performed any work under the said contract for which it has not received due payment, with the exception of a small amount of money for work done since the last settlement, and not exceeding a few hundred dollars.

(10) Defendant says that it is true as alleged in paragraph 10 of the complaint that plaintiff notified defendant of its election to can-

cel or rescind said contract and to bring its action for damages for the alleged breach thereof, but defendant says that said action of plaintiff was only for the purpose of attempting to cover up and to serve as a blind for its own shortcomings and default in the performance of the said contract.

(11) Defendant denies that it has refused to submit to arbitration the differences arising between the parties hereto under the said contract and avers that it has been at all times ready and willing to submit the same to arbitration in accordance with the terms of said contract.

(12) Defendant specifically denies that plaintiff has supplied work, labor, and materials in and about the construction of the said Federal building of a fair, reasonable and agreed value of $45,237.00, and defendant avers that the value of the work, labor, and materials furnished and actually placed by plaintiff in and about said building amounts only to the sum of $4,439.55 which amount has been paid by defendant to plaintiff and received by the latter in full satisfaction for all work and materials furnished and put in place by it, with the exception of the small sum, as above mentioned representing services performed since the last settlement.

13 (13) Defendant specifically denies that plaintiff has been damaged in the sum of $35,525.00, or in any other sum on account of money expended by it in and about the furnishing of work, labor, and materials provided for by said contract or for any other cause in connection therewith, and defendant further denies that plaintiff has been damaged in the sum of $5,000.00, by reason of loss of time, waste of material, and damage to equipment caused by the alleged delay of defendant, and defendant further denies that plaintiff has *has* been damaged in the sum of $9,712.00 for or on account of profits expected or otherwise, and defendant denies that plaintiff has been damaged in any sum whatsoever by defendant on account of the matters and things set forth in the said complaint.

(14) Defendant further answering the said complaint says that the sub-contract as aforesaid between plaintiff and defendant was and is subject to all the terms and conditions of an original and principal contract executed between defendant and the Government of the United States of America, by its duly constituted authorities on the — day of December, 1910, providing for the construction in the city of San Juan of a so called Federal Building.

(15) And defendant avers that the work and materials to be performed and furnished in and about the construction of said building were and are subject to the absolute regulation control, approval, and acceptance of the duly authorized representatives of the Federal Government.

(16) Defendant avers that it has at all times proceeded strictly in accordance with the terms and conditions of the said original contract made by it with the Federal Government and has been governed in the performance of work and the furnishing of material either by it, or by the said sub-contractor, plaintiff

14 herein by the orders of the said representatives of the Federal Government.

(17) Defendant says that during the course of the construction of the said Federal Building the representatives of the said Federal Government found it desirable or necessary to change the plans for and the manner of construction of the foundations for the said building and that said action of the Federal Government was within the terms and rights conceded to it by the original contract made between it and defendant; defendant avers that plaintiff was equally with defendant to, accept such action upon the part of the Federal Government.

(18) Defendant further avers that plaintiff improperly and wrongfully has endeavoured and attempted to take advantage, without the sanction of law, of this circumstance to cover up and excuse its own shortcomings and default in the performance of the obligations assumed by — in its sub-contract with defendant.

(19) Defendant avers that as is set forth in the counter-claim accompanying this answer, plaintiff has failed and neglected to carry out the terms of the sub-contract which it has entered into with defendant and has without right or reason declined to carry on the work and to furnish the materials required under the sub-contract entered into with defendant.

Wherefore defendant prays judgment with all costs,

Counter-Claim.

Defendant P. J. Carlin Construction Company, by way of counter-claim against plaintiff says:

1. That notwithstanding the obligations assumed by plaintiff in the said sub-contract entered into with defendant on the 16th day of December, 1910, for the furnishing and setting in position, including the concrete backing, of all the imitation of sand-stone, and to construct the interior of concrete walls, concrete floors, concrete roof, backing the granite construction, enclosing all the I beams, and various other labor and materials as in said sub-contract specified, plaintiff has without good or sufficient cause failed and refused and still refuses to carry on and perform the said work and to furnish such materials for which it was to receive the sum of $64,750.00.

2. By reason of the failure and refusal of plaintiff as aforesaid to perform the terms and conditions of said sub-contract, defendant will be obliged to perform the said work and to furnish such material at a cost in excess of the said sub-contract price of more than $40,000.00.

3. By reason of the wrongful and improper conduct of plaintiff defendant is damaged in the sum of $40,000.00 for which amount defendant prays judgment against plaintiff with all costs.

(Signed) F. H. DEXTER,
Attorney for Defendant.

John J. Carlin, being duly sworn upon his oath, says that he is Vice President of the P. J. Carlin Construction Company and that the facts set forth above are true as he verily believes.

(Signed) JOHN J. CARLIN,
Vice President.

Subscribed and sworn to before me this 29th day of July, 1912.

[SEAL.] (Signed) RAFAEL GUILLERMETY,
Clerk Dist. Court of U. S. for P. R.

16 In the District Court of the United States for Porto Rico.

Filed November 2, 1912.

Law. No. —.

GUERINI STONE COMPANY, Plaintiff,
vs.
P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

Amended Complaint.

Now comes the plaintiff above named and amends its complaint heretofore filed herein, as follows;

By striking out paragraph marked 10 of said complaint and inserting in its stead the following:

"10. That because of said repeated violation and breach of said contract on the part of the defendant, plaintiff, under date of May 22nd, 1912, notified defendant in writing of its election to terminate said contract and to bring its action for damages for breach thereof."

By striking out the figures "$50,237.00" in the next to the last line of said complaint, and inserting in their stead the figures $45,-797.45.

San Juan, Porto Rico, November 1st, 1912.

(Signed) E. S. PAINE,
Attorney for Plaintiff.

17 In the District Court of the United States for Porto Rico.

Filed November 9, 1912.

Law. No. —.

GUERINI STONE COMPANY, Plaintiff,
vs.
P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

Amended Bill of Particulars.

Labor payroll paid at San Juan office	$11,687.21
Labor payroll paid at Boston Office	2,794.56
Salary and expenses of G. A. Follett, Local agent	2,893.85
Freight bills and passage fares paid at Boston office to N. Y. & P. R. S. S. Co	1,117.23
Passenger fares paid from San Juan Office	710.00

Lumber & Hardware	3,667.53
Broken Stone	1,960.87
Cement and Plaster	2,843.05
Electricity	401.51
Invoices paid from Boston Office	1,135.14
Rent of Tools and Machinery	5,805.00
Sand purchased and delivered	419.96
Freight, express and cartage paid at San Juan office	121.28
Miscellaneous expenses	631.69
Value of tools and machinery converted by defendant	3,500.00
Value of time of Mr. Converse, president, 66 days devoted to visits to Porto Rico on this contract at $25.00 per day	1,650.00
Value of time of Mr. Converse, president, 4 days devoted to visits to New York City at $25.00	100.00
Anticipated profits from performance of contract	9,712.00
	$51,150.88

Cr.

Cash from defendant on contract	$3,765.50	
Cash from defendant on contract	674.05	
Cash from defendant for shed sold	65.00	
Cash for outside work	710.00	
Cash for lumber sold	243.01	
		$5,457.56
Balance		$45,693.32

San Juan, P. R., November 9th, 1912.

(Signed) E. S. PAINE,
Attorney for Plaintiff.

Service of copy acknowledged this — day of November, 1912.

——— ———,
Attorney for Defendant.

18 I hereby certify that I personally served a copy of the above bill by leaving a copy thereof on the desk of attorney for defendant in his office, there being no one there to receive the same, at 11.20 A. M. Sat. Nov. 9, 1912.

(Signed) E. S. PAINE,
Attorney for Plaintiff.

19 In the District Court of the United States for Porto Rico.

Filed November 13, 1912.

Law. No. —.

GUERINI STONE COMPANY, Plaintiff,
vs.
P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

Plaintiff's Amendment to Bill of Complaint.

Now comes the plaintiff herein and amends its bill of complaint hereinbefore filed as follows;

By striking out paragraph 13 thereof, and inserting in its place the following:

That plaintiff has been damaged by outlays and disbursements made by it, in and about the furnishing of work, labor and materials and expense provided for by said contract $38,670.87.

In time and services devoted to the contract by the president of the plaintiff corporation $1,750.00.

In loss of anticipated profits which plaintiff would have made if defendant had complied with the terms of its contract $9,712.00.

And that no part thereof has been paid, except the sum of $4,439.55.

Wherefore plaintiff demands judgment against the defendant in the sum of $45,693.32.

(Signed) E. S. PAINE,
Attorney for Plaintiff.

Service of Copy acknowledged this — day of November, 1912.

———,
Attorney for Defendant.

20 In the District Court of the United States for Porto Rico.

Journal Entry, November 16, 1912.

891. Law.

GUERINI STONE COMPANY
vs.
P. J. CARLIN CONSTRUCTION COMPANY.

Now, on this day, comes the Jury, under the custody of the United States Marshal, and in response to the question of the Court in that regard, say that they have agreed upon a verdict, which verdict appears to be a sealed verdict, as follows, to wit:

Verdict.

"We, the Jury, find for the plaintiff and assess its damages in the sum of Six Thousand Six Hundred and Nine Dollars and Twenty-five Cents ($6,609.25), including the value of tools, invonto*n*ed at $3,000.00.

(Signed) JOHN W. TURNER, *Foreman.*"

which said verdict is read by the Clerk, and the Jury being asked if that is their verdict, they all say that "It is." And thereupon the Clerk is ordered to file and enter of record said verdict, and the Jury is discharged from further consideration of the cause.

Judgment.

It is, therefore, considered and adjudged that the plaintiff, Guerini Stone Company, recover of the defendant, P. J. Carlin Construction Company, the sum of Six Thousand Six Hundred and Nine Dollars and Twenty-five Cents ($6,609.25), with interest thereon at 6% per annum, from this date until paid, and its costs herein laid out to be taxed by the clerk.

21 In the District Court of the United States for Porto Rico.

(Filed Dec. 3rd, 1912.)

No. 891, San Juan.

GUERINI STONE COMPANY
vs.
P. J. CARLIN CONSTRUCTION COMPANY.

Comes now the plaintiff Company, by its attorney E. S. Paine, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment therein by the District Court of the United States for Porto Rico on the 16 day of November, A. D. 1912, manifest error hath happened to the damage and prejudice of this plaintiff.

Wherefore said plaintiff prays the allowance of a writ of error to the Honorable, the Supreme Court of the United States, and for an order enlarging the time within which this plaintiff may prepare and present its bill of exceptions to the rulings of this Court herein, fixing the amount of the bond to be given by it for costs upon said writ of error, and for such other orders and process as may cause the same to be transferred to said Supreme Court of the United States for review.

And your petitioner will ever pray.

(Signed) E. S. PAINE,
Attorney for Plaintiff.

22 In the District Court of the United States for Porto Rico.

(Filed Dec. 3, 1912.)

No. 891, San Juan.

GUERINI STONE COMPANY
vs.
P. J. CARLIN CONSTRUCTION COMPANY.

Order Allowing Writ of Error and Fixing Bond.

The Guerini Stone Company, a corporation, the plaintiff above named, having this day filed its petition for a writ of error from the judgment of this court herein to the Supreme Court of the United States, for an order enlarging the time for preparing and presenting its bill of exceptions, and for the fixing of the amount of the bond to be given for costs upon said writ of error, and said petition being now allowed and said writ of error signed;

Now, therefore, it is hereby ordered that said plaintiff be allowed a period of three months from this date for preparing and presenting for approval its bill of exceptions herein; and that the penal sum of said bond to be given for costs be, and the same hereby is, fixed at Two Hundred and Fifty Dollars, said bond to be condi-
23 tioned as provided by law; and that, upon the request of said plaintiff after the approval of said bond, the Clerk of this court is hereby directed to prepare a transcript of the record in this cause according to the præcipe which may be filed by the parties for transmission to said Supreme Court of the United States, in accordance with law.

Done and ordered in open Court at San Juan, this 3d day of December, A. D. 1912.

[SEAL.] (Signed) PAUL CHARLTON, *Judge.*

24 In the District Court of the United States for Porto Rico.

No. 891, San Juan.

GUERINI STONE COMPANY
vs.
P. J. CARLIN CONSTRUCTION COMPANY.

Writ of Error.

The President of the United States to the Honorable the Judge of the District Court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for Porto Rico before you, between the Guerini Stone

Company, a corporation existing under the laws of the State of Massachusetts, plaintiff, and the P. J. Carlin Construction Company, a corporation existing under the laws of the State of New York, defendant, manifest error hath happened to the great damage and prejudice of the said Guerini Stone Company, plaintiff, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within sixty days from the date hereof, at a Term of said Supreme Court to be then and there held, in order that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Paul Charlton, Judge of the District Court of the United States for Porto Rico, and the seal of said Court, this 3rd day of December, A. D. 1912.

[Seal United States District Court for the District of Porto Rico.]

RAFAEL GUILLERMETY,
Clerk U. S. District Court for Porto Rico.

San Juan, Porto Rico, December 3, 1912.

Allowed by
PAUL CHARLTON, *Judge.*

25 In the District Court of the United States for Porto Rico.

No. 891, San Juan.

GUERINI STONE COMPANY
vs.
P. J. CARLIN CONSTRUCTION COMPANY.

Bond on Writ of Error.

Know all men by these Presents that we, E. S. Paine, Attorney for the plaintiff, as principal, and R. L. Holmes and J. C. Spear, as sureties, are held and firmly bound unto the P. J. Carlin Construction Company, defendant above named, in the penal sum of Two Hundred and Fifty Dollars, for the payment of which well and truly to be made to said defendant, its successors or assigns, we do bind ourselves, our heirs, executors, administrators and successors, jointly and severally firmly by these presents.

Signed with our seals and dated this 4 day of December, A. D. 1912.

Whereas the above named plaintiff recovered a judgment against the defendant in the above cause on the — day of November, 1912, but, being dissatisfied with the amount thereof, has sued out its writ of error to the Supreme Court of the United States to review said judgment; now, therefore, the condition of this obligation is such that if the said Guerini Stone Company, plaintiff in error, shall prosecute its said Writ to effect and shall answer all costs that may be adjudged against it, if it fail to make good its said plea, then this obligation shall be void, else to remain in full force and effect.

(Signed) E. S. PAINE. [SEAL.]
(Signed) R. L. HOLMES. [SEAL.]
(Signed) J. C. SPEAR. [SEAL.]

Witnesses:

(Signed) N. B. K. PETTINGILL.
(Signed) LOUIS BANIGAN.

Approved December 4th, 1912.

(Signed) PAUL CHARLTON, *Judge.*

26 UNITED STATES OF AMERICA, *ss:*

To P. J. Carlin Construction Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the District of Porto Rico, wherein the Guerini Stone Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul Charlton, Judge of the District Court of the United States for Porto Rico, this tenth day of December, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States District Court for the District of Porto Rico.]

PAUL CHARLTON,
Judge of the District Court of the United States for Porto Rico.

On this eleventh day of December, in the year of our Lord one thousand nine hundred and twelve, personally appeared the subscriber, as attorney of record for the P. J. Carlin Construction Company, defendant in error, acknowledges service and delivery of a true copy of the within citation.

FRANCIS H. DEXTER,
Attorney for the P. J. Carlin Construction Co.

27 *Writ of Error.*

UNITED STATES OF AMERICA *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for Porto Rico, before you, between Guerini Stone Company, Plaintiff, and P. J. Carlin Construction Company, Defendant, a manifest error hath happened, to the great damage of the said P. J. Carlin Construction Company, defendant, as by the said complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the tenth day of December, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States District Court for the District of Porto Rico.]

RAFAEL GUILLERMETY,
Clerk of the District Court of the United States for Porto Rico.

Allowed by:
PAUL CHARLTON,
Judge of the District Court of the United States for Porto Rico.

28 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Guerini Stone Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the District of Porto Rico, wherein the P. J. Carlin Construction Company is plain-

tiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul Charlton, Judge of the District Court of the United States for Porto Rico, this tenth day of December, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States District Court for the District of Porto Rico.]

PAUL CHARLTON,
Judge of the District Court of the United States for Porto Rico.

On this tenth day of December, in the year of our Lord one thousand nine hundred and twelve, the subscriber, as attorney of record for the Guerini Stone Company, defendant in error, acknowledges service and delivery of a true copy of the within citation.

E. S. PAINE,
Attorney for Guerini Stone Company.

[Endorsed:] Original. Send to Washington.

29 In the District Court of the United States for Porto Rico.

GUERINI STONE COMPANY, Plaintiff,
vs.
P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that at a term of said District Court of the United States for Porto Rico, held in the City of San Juan on the 14th day of October, 1912, a cause therein pending, wherein Guerini Stone Company, a corporation organized and existing under the laws of the State of Massachusetts was plaintiff, and P. J. Carlin Construction Company, a corporation organized and existing under the laws of the State of New York was defendant, came on to be tried on the 11th day of November, 1912, before the Honorable Paul Charlton, Judge of said Court, at which time came the said parties, by their respective attorneys, Edward S. Paine, and N. B. K. Pettingill, for the plaintiff, and F. H. Dexter, for the defendant, and thereupon, the said issues joined between the parties, came on to be tried, and the jurors of the jury, whereof mention is made in the record, being called likewise came and were sworn to try the said issues upon the merits of said cause in manner aforesaid joined.

Thereupon, the plaintiff to maintain the issues upon its part produced and offered in evidence the contract dated and entered into on the 16th day of December, 1910, between the plaintiff and the

defendant, which said contract was admitted in evidence, without objection, and marked Exhibit 1 for Plaintiff, and is in words and figures following to wit:

30 *Articles of Agreement.*

Made the sixteenth day of December in the year one thousand nine hundred and ten By and between P. J. Carlin Construction Company, parties of the first part (hereinafter designated the General Contractors) and Guerini Stone Company, party of the second part (hereinafter designated the Sub-Contractor.) Witnesseth that the Sub-Contractor, being the said party of the second part, in consideration of the covenants and agreements herein contained on the part of the General Contractors, being the said parties of the first part, does covenant, promise and agree with the said General Contractors, in the manner, that is to say:

1st. The Sub-Contractor shall and will well and sufficiently perform and finish in a thoroughly workmanlike manner under the direction and to the satisfaction of the General Contractors and James Knox Taylor, Architect (acting as Agents of the Owner) or his, or its representative. To furnish and set in position, including the concrete backing, all the imitation of sand stone, and to construct the interior concrete walls, concrete floors, concrete roof, backing the granite construction, enclosing all the I beams for and at the San Juan post office building, at San Juan, Porto Rico, agreeable to the drawings and specifications, made by the said architect (Copies of which have been delivered to the Sub-Contractor), and to the dimensions and explanations thereon, therein and herein contained, according to the true intent and meaning of said drawings and specifications, and of these presents, including all labor and materials incident thereto, and shall provide, at his own expense, all scaffolding, implements, moulds, models, hoisting and cartage necessary for the due performance of the said work or works.

2nd. The Architect or the General Contractors shall furnish to the Sub-Contractor drawings and esplanations necessary to detail and illustrate the work to be done, and the Sub-Contractor shall conform to the same as part of this contract, and in the event of any doubt or question arising respecting the true meaning of the drawings and specifications, the decision of the Architect thereon shall be final and conclusive. It is mutually understood and agreed that all drawings and specifications are to remain the property of the Architect and upon the completion of the work, are to be delivered to the General Contractors.

3rd. No alterations shall be made in the work or materials shown or described by the drawings and specifications, except upon a written order of the General Contractors, and when so made, the value of the work and materials added or omitted shall be determined by the General Contractors, and the amount so determined shall be added to or deducted from the contract price, as hereinafter provided. In the case of dissent of either party hereto from such determination of the General Con-

tractors the Valuation of the work and materials added or omitted shall be submitted to two disinterested Arbitrators, one to be appointed by each of the parties to this contract, and the Arbitrators so chosen shall if themselves unable to agree, choose a third without unnecessary delay, and the decision in writing signed by those assenting thereto of any two of the Arbitrators, shall be final and binding on the parties hereto, and each of the parties shall pay one-half of the expenses of such reference. The determination and adjustment in the manner aforesaid of the value of any work or materials to be added to or deducted from the contract price, shall be a condition precedent to the right to demand and receive the value of any additional or extra work and materials, and no action will lie for the value thereof until the condition has been performed.

31

4th. The Sub-Contractor shall provide sufficient safe and proper facilities, at all times, for the inspection of the work by the Owner, Architect and General Contractors, or the authorized representatives of either of them, and must upon request of the General Contractors, produce all vouchers showing quality of material used. The Sub-Contractor shall, within twenty-four hours after receiving written notice from the General Contractors to that effect, at his own cost and expense, proceed to remove from the grounds or building all materials condemned by the Architect or General Contractors whether worked or unworked, and to take down all portions of the work which the Architect or General Contractors shall, by like written notice, condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications. Work done or materials furnished by any Sub-Contractor and not approved by the Architect and General Contractors shall not be accepted.

5th. Should the Sub-Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality and quantity or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on his part herein contained, the General Contractors shall be at liberty, after three days' written notice to the Sub-Contractor to provide any such labor or materials and to deduct the cost thereof from any money due or thereafter to become due to the Sub-Contractor under this contract; and the General Contractors shall also be at liberty to terminate the employment of the Sub-Contractor for the said work, and to enter upon the premises and take possession of all materials and appliances of every kind whatsoever thereon, and to employ any other person or persons to finish the work and to provide the materials therefor; and in case of the discontinuance of the employment of the Sub-Contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the General Contractors in finishing the work such excess shall be paid by the General Contractors to the Sub-Contractor, but if such expense shall exceed such unpaid balance, the Sub-Contractor shall pay the difference to the General Contractors

as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate shall be conclusive upon the parties.

6th. The Sub-Contractor shall and will proceed with the said work, and every part and detail thereof in a prompt and diligent manner, and shall and will do the several parts thereof at such times and in such order as the General Contractors or Architect may direct, and shall and will wholly finish the said work according to the said drawings and specifications, and this contract in 300 days from the date upon which the building is ready to receive his work
32 and after he has been notified to proceed by General Contractors, and in default thereof, the Sub-Contractor shall pay the General Contractors the sum of twenty dollars for every day thereafter that the said work shall remain unfinished as and for liquidated damages. The Sub-Contractor further agrees to begin work at the building within three days from the time that he is notified by the General Contractors that the building is ready to receive such work.

7th. The Sub-Contractor shall not cause any unnecessary hindrance or delay to other contractors on said buildings and shall bear all damages done to the work of such other contractors by his employees. Should the Sub-Contractor be obstructed or delayed in the prosecution or completion of the work by neglect, delay or default of the Owner, the Architect, the General Contractors, or of any other contractors employed by them upon the work, or by alterations which may be required in said work, of by any damage which might happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employees through no fault of the Sub-Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be made unless a claim therefor is presented in writing to the General Contractors within twenty-four hours after the occurrence of such delay. The General Contractors shall award and certify, in writing, the amount of additional time to be allowed. The Sub-Contractor may appeal from said award to arbitrators constituted as provided in Article 3rd of this contract.

8th. The General Contractors will not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said words, or any part or parts thereof respectively or for any of the materials or other things used and employed in finishing and completing the said works; or for injury to any person or persons, either workmen of the public, or for damage to adjoining property, for any cause which might have been prevented by the Sub-Contractor or his workmen, or by anyone employed by him; nor will the General Contractors be answerable or accountable for violation of any letters patent or patent rights, or any infringement thereof by the Sub-Contractor, or by reason of the use by the Sub-Contractor of any art, machine, manufacture or composition of matter on said works in violation of any patent or patent rights, or

infringement thereof, against all which injuries and damages to persons and property the Sub-Contractor having control over such work must properly guard and hold the General Contractors harmless, and must make good all damage from whatever cause, being strictly responsible for the same. Where there are different contractors employed on the works each shall be responsible to the other for all damage to work, to persons or property or for loss caused by neglect, by failure to finish work at proper time and preventing each portion of the works being finished by the several Sub-Contractors in the time named in this contract for completion, or from other cause; and any Sub-Contractor suffering damage shall *cause* the attention of the General Contractors to the same, for action as laid down in Article 3rd on this contract.

33 9th. The Sub-Contractor shall, at his own cost and expense, apply for and obtain all necessary permits, and the Sub-Contractor further agrees that all work performed and all materials furnished by him under this contract shall comply strictly with the laws and ordinances in force in the locality in which the building is erected, and that he will comply promptly with all ordinances, regulations, rules and orders of the City Government and of any and all of its departments and bureaus, and that he will so perform said work and furnish said materials in accordance with such laws and ordinances, and so comply with such ordinances regulations rules and orders whether the work and materials for the same are or are not included and provided for in the plans, drawings and specifications; and all such work and materials made necessary by such laws, ordinances, regulations, rules and orders in order to complete the work contemplated in this contract shall be performed and furnished without extra charge or expense to the General Contractors. The Sub-Contractor will be responsible for a violation of any such laws, ordinances, rules and orders, and will indemnify the General Contractors for any loss or damage resulting to them by reason of such violation.

10. Should the proper, workmanlike and accurate performance of any work under this contract depend in any way upon the proper, workmanlike or accurate performance of any work by another contractor on said building, the Sub-Contractor agrees to use all means necessary to discover any defects in such contractor's work, and to report the same in writing to the General Contractors before proceeding with his work which is so dependent; and shall allow the General Contractors a reasonable time in which to remedy such defects; it being the intention of the parties hereto that the entire work on said building shall be properly performed in a workmanlike manner.

11th. The General Contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Sub-Contractor, agree that they will reemburse the Sub-Contractor for such loss; and the Sub-Contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the General Contractors shall

become liable, then, he shall make good to the General Contractors any such damage over and above any damage for general delay, herein otherwise provided; the amount of such loss or damage in either case, to be fixed and determined by the Architect, or by arbitration, as provided in Article 3rd in this contract.

12th. It is hereby mutually agreed by the parties hereto that the sum to be paid by the General Contractors to the Sub-Contractor for said work and materials shall be sixty-four thousand seven hundred and fifty dollars (-64,750.00) subject to additions or deductions as hereinbefore provided, and that such sum shall be paid in current funds by the General Contractors to the Sub-Contractor in monthly payments on account, not to exceed in amount 85% *per cent* of the cost of the work actually erected in the building, provided that the Sub-Contractor furnishes to the General Contractors a written requisition, on a form to be supplied by the General Contractors, not less than twelve days before payment is required, it being understood that the final payment shall be made within forty days after this contract has been completely performed and all drawings,
34 plans and specifications have been returned to the General Contractors by the Sub-Contractor; and provided before each payment, if required, the Sub-Contractor shall give the General Contractors good and sufficient evidence that the premises are free from all liens and claims chargeable to the Sub-Contractor, and further that if, at any time, there shall be any lien or claim or conditional contract for which, if established, the General Contractors on the said premises might be made liable, and which would be chargeable to the said Sub-Contractor, the General Contractor shall have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify against such lien or claim, until the same shall be effectually satisfied, discharged or cancelled, and if there should prove to be any such claim after all payments are made, the Sub-Contractor shall refund to the General Contractors all monies which the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the former's default.

13th. It is further mutually agreed between the parties hereto that no payment made under this contract shall be conclusive evidence of the performance of this contract, either wholly or in part against any claim of the General Contractors, and no payment shall be construed to be acceptance of any defective work.

14th. In case the nature of the damages or defects of any particular work or works is such that in the judgment of the General Contractors, it is not expedient to have the work corrected, the General Contractors shall have the right to take such sums of money from the amount due to the Sub-Contractor, on the final settlement of the accounts as the General Contractors consider a fair and reasonable remuneration for the difference in value of the material or work furnished from that specified or for the damage to the complete work.

15th. The Sub-Contractor will insure the work to cover his interest in the same from time to time; and for any loss of the Sub-

Contractor by fire, the General Contractors will not, under any circumstances, be answerable or accountable, but the General Contractors may protect the works at their option, by insurance, to cover their interest when payment *have* been made to the Sub-Contractor.

16th. The Sub-Contractor is to furnish a competent representative who is to be kept constantly on the ground to represent the Sub-Contractor for the purpose of receiving notices, orders and instructions. The Sub-Contractor is also, when called upon by the General Contractors, to report the General progress of the work at the building or elsewhere.

17th. In case of day work, all vouchers for the same are to be delivered to the General Contractors at latest, during the week following that in which the work may have been done, and only such day work is to be allowed for as such as may be*en* authorized by the General Contractors in writing to be so done.

18th. The Sub-Contractor also agrees in all cases of additions and deductions, omissions or substitutions to charge or credit the amount of same at market rates, and to furnish unit prices for all items required by the General Contractors.

19th. The Sub-Contractor shall not let, assign or transfer this contract, or any interest therein, without the written consent of the General Contractors.

20th. The Sub-Contractor shall make no claim for additional work unless the same shall be done in pursuance of written order from the General Contractors, and notice of all such claims shall be made to the General Contractors in writing before the next ensuing payment, or shall be considered as abandoned by the Sub-Contractor.

21st. Whereve- notice in writing to be given to Sub-Contractor is herein provided for, a notice mailed to the last known address of the Sub-Contractor shall be sufficient.

22nd. The Sub-Contractor further agrees not to display on or about the premises any sign, trade mark or other advertisement.

23rd. The Sub-Contractor further agrees, to guarantee his work, and to make good without cost to the Owner or General Contractors, any and all defects which may appear during the time specified by the General Contractors in the guarantee.

24th. The Sub-Contractor further agrees that all disputes arising between himself and his employees shall be adjusted according to the joint arbitration plan of the Building Trades Employers' Association and the representatives of the Unions, as set forth in the document of July 9, 1903.

25th. The Sub-Contractor further agrees to furnish the material and build the concrete footing complete to the basement floor for the sum of $6.70 a cubic foot.

Also to furnish the materials and build all the sidewalks for the sum of $1.85 a square *year*.

Also set in position all the granite walls, steps, balusters, buttresses and curbing, and all other granite work for the sum of 40 cents a square foot surface. The three above items to be at the option of the general contractor.

If reinforced concrete is substituted for steel beams, the price

will be the same, all the reinforcement and all anchors will be provided by the steel contractor.

The general contractor agrees to furnish two derricks complete, and one engine, the sub-contractor to pay for all cost of operating same when used by him. It is further understood that if the Government accepts granite imitation for the granite in the base, the sub-contractor agrees to furnish materials and set in position, including the backing all the imitation granit- or casting, and for the further sum of twenty thousand eight hundred and seventy nine dollars ($20,879.00).

It is agreed that a satisfactory bond in the sum of $15,000.00, acceptable to the General Contractors will be furnished by the Sub-Contractor.

And the said General Contractors hereby promise and agree with the said Sub-Contractor to employ, and do hereby employ him to provide the materials and to do the said work according to the terms and conditions herein contained and referred to for the price
36 aforesaid, and hereby contract to pay the same at the time, in the manner, and upon the conditions above set forth.

And the said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In Witness Whereof, the parties to these presents have hereunto set their hand and seals, the day and year first written above.

P. J. CARLIN CONSTRUCTION CO.,
J. P. CARLIN, *Secretary.*
GUERINI STONE CO.,
A. GUERINI.

In presence of
K. M. ZINK.
K. M. ZINK.

Thereupon, further to maintain the issues upon its part, plaintiff called and produced as a witness, George A. Follett, who, after being duly sworn, testified as follows:

I am resident of San Juan, and by occupation, a contractor's superintendent. In February, 1911, Mr. Converse, the President of the plaintiff company ordered me to leave New York for San Juan, and urged me to hurry, but I was unable to go because of personal reasons, until the 18th, and arrived in San Juan on February 23rd, which was on a Thursday, and we expected to be at work on the following Monday morning, as Mr. Converse had urged speed. After that time, I was the local agent of the plaintiff company at San Juan and in charge of their work at the Federal Building. Upon my arrival, I found the building site cleared and two or three trenches dug for foundations. Very little, if any, concrete had been placed. The work was not ready for us to go ahead on the building under our contract, so we proceeded to establish ourselves, by getting our tools and machinery here, building our workshops and office, and beginning to make our moulds for the stone work which goes in above. On the same steamer, came to San Juan Mr. Converse, the

president of the company, and the week previous Mr. Guerini and one moulder had come down, and as soon as our shops were up so as we could work they started in to make their moulds (plaster)
37 from which we cast our artificial stone. We went on erecting our building and making some moulds (that not being a part of the actual work on the building, and as it turned out it was several months before we were able to do any actual work on the building. This making of moulds was necessary preliminary work. We expected to begin work on the building within three or four weeks, or six weeks, but there were continuous suspensions all that Spring and Summer, but we were expecting to go to work such a short time ahead that we could not send our men back to the States and bring them down again, because it was too short a time, and it would cost too much money, so during that time we did all we could in the way of preliminary work.

During all this time, we were ready and willing to go to work on the building, and had a great deal of machinery here in the Spring, and it was lying idle. This condition of working a little in the making of moulds, and waiting to go to work on the building lasted until the first of October. About the first week in October, the Foundation work, and the grading inside of the foundation walls had reached such a point that we began to get our machinery out of the crates and establish it on the building site where it was to be used in our work. We set up power saws (which had to be protected by sheds) and built runways for the concrete material, and the concrete mixer, and we installed a fine mixer, electric motors and machinery. Roughly speaking, that took two or three weeks. About the middle of October, there was enough stone on the ground, enough granite for the base for us to make a start at setting granite. The first we knew about the granite setting was about three or four weeks previous; I think in September, when some letters came directing us to proceed with the granite setting. The reason that we did not start with the work immediately after the receipt of the letters was that it was not ready for us: We could not do anything
38 until we had the granite there, and the equipment. The duty of putting the granite on the building site belonged to the Carlin Company, and it was our business to place it in position. The Granite was not delivered in such volume or such consecutive order as to enable us to proceed. There were a great many missing stones. Pieces we wanted first were not there. Each piece of granite was supposed to be delivered finished ready to be placed in position for permanent setting and to be set in place by the derrick. According to my recollection, we first started to set some stones in the southwest corner of the building about the 13th of October, 1911, but there was some question about the dimensions there, so we stopped and went to the Southeast corner. The question of dimensions was raised by the Government Superintendent, and related to the length of the concrete foundations as compared with the length of the granite course. The granite seemed to be too long for the foundation. We had nothing to do with building the foundations, that was done by the Carlin Company. After going to the Southeast corner there

was some question about the first course fitting there. On the 16th of October, however, this difference, whatever it was, had been adjusted between the Carlin Company and the Superintendent, and we went ahead and set all the granite we could in that Southeast corner, but I would not be sure as to that, because we had to go from one part of the building to the other, wherever the foundation was ready for us, and we had the stones. Sometimes we set stones on one corner for three or four hours, or a half a day, and then we would have to move to the other. We were unable to work both ends at the same time on account of our derrick equipment. We had two derricks but only power for one. The derricks were provided by the Carlin Company, who were bound to provide two derricks
39 complete and one engine. They provided two derricks, but in my opinion, they were not complete, because they could not be worked at the same time. Two months later they provided additional motive power. The extreme dates of setting granite were from the 16th of October to the 12th of February. We set it as fast as it was delivered to us. It came along in several shipments a little at a time. We could only work from two to four granite setters at any one time, and if we had brought more men down from the States they would have to wait for new shipments. As the granite came, we set all that could be set. The final shipment which we placed in position was received in San Juan not until the 15th of January, and was not delivered at the site until about three days later and we were ready for that when it reached the building site. We immediately started setting that granite, and that was the last shipment that we had set, and we ceased setting granite about the 12th of February. Between these two periods, I would not say that there was delay exactly, but we were unable to work the men to the extent that we should have been allowed to. We could have worked twice as many men if we had had them, and if the granite had been there, and if the derrick equipment had been as it should have been. The granite had a course of concrete behind it called "backing", and when a few stones of the granite were set we started putting in the concrete backing; that was within a few days after the 16th of October, but we could not keep at it continually. The same thing happened with the concrete as was happening with the granite; that is, the derrick was employed swinging the granite into position, and also putting the concrete in place, and because we could only use one derrick at a time we had to work very slowly. They would pick up the concrete and put it in place for the masons, and then swing over and
40 put a piece of granite in position, and that continued until along in December, then they got another engine for the other derrick. In the latter part of that period we were also delayed by the building not being ready to receive the work. After we got the granite pretty well up, and the backing pretty well in, we started the interior concrete walls, arch door-ways, etc. for which forms had to be made, and as soon as these walls got up, there were certain steel beams and steel columns to be placed in there to support part of the first floor. We got pretty well along with that and with the exterior walls, and some of the interior walls were all in place when they

started setting the steel, but they did not set it fast enough to suit us so that we could put on enough men to make a continuous operation of it. We were held up a day here and a day there in different parts of the work. We set the final shipment of granite in about three weeks after we received it, and then we stopped setting granite, and all our work after that was on our contract for the concrete.

Refreshing my memory from certain letters written by me, and from some estimates made under my supervision, I am able to testify as to the actual amounts of concrete poured and granite set up to January 26th, 1912. Up to that date, we had made and placed 468 cubic yards of concrete, and had set in position 3,757 square feet of granite that is, of granite surface as provided in our contract. After January 26th, we proceeded with our work, but as I stated before we stopped setting the granite about the 12th of February. On the 3rd of February, we made another estimate, and in the first days of March we started the first slab for the first floor, and proceeded with that, and were having several good days of making and placing concrete, when, on the 9th of March, 1912, we were
41 ordered by the Carlin Company to cease all work, and since that date we have done no work on our contract. I estimated that we had made and placed about 600 cubic yards of concrete in all the time we had been working and had put in place about 800 square feet of granite in addition to the 3,757 given before. The pouring of the 600 and odd yards of concrete extended over the period from about the middle of October, 1911, to the 9th of March, 1912, when work was stopped in March 1912. My opinion, based upon experience that I had had on other buildings and on my experience on this building, experience as to local conditions of labor, etc. was, that it would be August at the earliest before we could resume our work on the contract. We wrote Mr. Converse to that effect. I have made a superficial examination of the building site within the last few days, and so far as I know, no more work included in our contract has yet been done.

Whereupon, counsel for plaintiff asked the witness the following questions;

Q. "Based on the conditions that you have seen, how long would it be before you could have completed your work under that contract, if you had continued?

to which counsel for defendant objected as being too speculative.

The Court sustained said objection to which ruling of the Court counsel for plaintiff excepted.

Cross-examination by Mr. DEXTER:

I am not an engineer in the sense of being a technical graduate. I have been in that line of work nine or ten years in Boston, Mass. I have worked on steel buildings setting steel, iron and concrete work as a workman, and I have also had experience as an office man estimating new work. I am a nephew of Mr. Converse, presi-
42 dent of the Guerini Company who is engaged in structural steel and iron work, but not altogether that. He is also en-

gaged in concrete construction. I was working with the Company of Mr. Converse, that company is building brick, reinforced concrete and steel construction. Recently, I was at work on a dam and water power flume that we were putting in in New Hampshire. About three years ago, they built a car barn of concrete construction for the street railroad company of New Bedford, Mass., as General Constractors. That work was similar to the work under the present contract, except that it did not have the artificial stone that we had on this job. It was reinforced concrete throughout, with brick walls.

When I left the States in February, 1911, to look after this work, I knew very little about whether we were to set the granite, and did not come down prepared to do it. At that time I expected we were to do the concrete work from the foundations up as provided in our contract. I was ordered down in a hurry and knew nothing more about the job before I got here. The first thing I knew about the granite work was when we received the letter from the Carlin Company in September to proceed with it. Previous to that time we were making no preparation for that work. From February to September we were making the moulds in our mould shop for the artificially cast stone that had to be made. That kept two or three men busy. We also had our tools here which we could not use. We had men we could bring down on short notice, but we did not bring them because the work was not ready for them. The tools were for the concrete mixers, etc. I presume that before the granite stone could be set the basement flour had to be constructed, but I do not know about it. We were anxious to get to work because we wanted
43 to get our job finished, but we did not have an opportunity.

It is not necessarily a fact that no concrete work could be done until after the granite work had been constructed. It was possible to do interior concrete walls but the foundations were not ready, so as to permit of this, until about the first part of October. And the foundations on which the interior walls were to be placed are not even completed to-day. They are making changes now with the interior walls, that is the foundations for them. The foundation walls that carry the front portico were not ready in October, and after we had started out granite setting they were putting in concrete in the foundation of the east end of the building. There was machinery lying idle belonging to us up to October, including a concrete mixer, and many small tools, which were to be used in our concrete work, and which could have been used on concrete work on the interior walls before the granite had been constructed, so that from February to October there was nothing we could do except make the moulds for the imitation sandstone. There might have been something which it was possible to do but not in the exercise of good judgment, and without going to unwarranted expense. Our contract was that the foundations would be furnished us up to the basement floor level. The ground on the North side of the building is higher that that on the South Side. It was part of our contract to put in some concrete on the North side, if it was above the basement floor level. This was a wall six or eight feet high at that point. The work was done sometime in November or Decem-

ber. The reason why we waited until starting on the granite before levelling up the concrete at this point is what I have been trying to point out for you. We can't put on a big force of men for a small piece of work, and have to change them around to some-
44 thing else. We have to put on a force of men and keep them at the work, and we did not have that opportunity. We didn't have a chance to get a clear run or work ahead of us so we could bring men for concrete work down from the North and keep them at work constantly. We didn't keep men on our payroll except those needed for making our molds, forms, setting up machinery, shops, etc. The first granite course was started and a great deal of granite set before the piece of concrete work referred to on the North side was put in, and we though it best policy to wait until the time we started. The concrete mixer was put in place about the first week or so of October, 1911. Figures given by me covering the January 26th estimate, as to amount of concrete and granite set are correct of my own knowledge. We made another estimate at the end of February showing 104 yards more done at that time in February, whatever the exact date was. We then laid part of the first floor, concrete slab, after that date up to the 9th of March, off hand, 50 to 55 cubic yards. The last shipment of granite, as for as I know, has not arrived yet. The granite which which had been delivered for the basement floor is not all laid yet, as there are several stones which we couldn't find. From my point of view, the granite was not supplied from October to February at a rate to enable us to make good progress, or even customary progress. I am from New England.

Counsel for the defendant, then asked the following question:

Q. Are you not aware, being from that section, that getting stone from those New England States is attended with a great deal of difficulty in the Winter Months?

To this question, counsel for plaintiff objected, and his objection was sustained on the ground that the question was im-
45 material, and as exception was noted by counsel for the defendant.

Redirect examination by Mr. PAINE:

After we got started on October 13th, we made concrete as fast as we were practically able, it was'nt due to our inability to make it, but because of lack of place to put it. Owing to the fact that we had to leave room enough in the center of the building to swing the arm of the derrick there were some two or three interior walls that we had not started on on October 13th, aside from that we proceeded and went ahead as fast as we could. We placed our mixer and power saws, and got out our machines, and put them on the building and built protection for them as soon as we were able to do something on our part of the contract in the first of October. If all the granite stones had been there we could have put on two or three times as many stone cutters and laid it *quicker*, but the stones were not there.

Recross-examination by Mr. DEXTER:

When we started in October there were two derricks and one engine, in December they got another engine and we were able to work two derricks at the same time. I think that under the contract, which reads "two derricks complete and one engine" the Carlin Company was obligated to supply power to operate them, so that both could be worked at the same time.

Thereupon, further to maintain the issues upon its part plaintiff called and produced as a witness HOWARD P. CONVERSE who, after being duly sworn, testified as follows:

I live in Boston, Mass., my business is that of General Contractor. I am President and Treasurer of the Guerini Stone Company, which is a Massachusetts corporation formed to carry on this San
46 Juan Post Office contract.

Thereupon witness identified the following letters and telegram, which were introduced in evidence without objection, and marked Exhibits 2, 3 and 4 for Plaintiff, which are in words and figures the following, to wit:

EXHIBIT 2 FOR P'T'FF, #891.

J—2397.

Feb. 13, 1911.

J. P. Carlin Construction Co., 16 E. 23d St., New York City, N. Y.

GENTLEMEN: In accordance with conversation with you last Friday, we enclose herewith copy of the record of the transfer of the contract for concrete from Annibale Guerini to the newly incorporated Guerini Stone Company.

The record is attested as a true record by the Clerk, Edwin P. Bliss.

Yours truly,

H. P. CONVERSE & CO.

H.P.C./S.

EXHIBIT 3 FOR P'T'FF, #891.

The P. J. Carlin Construction Co.,
Building Contractors,
No. 16 East 23rd St.

Telephone 5226, 5227, Gramercy.

J-2397.

New York, 2/20/11.

The Guerini Stone Company, 88 Broad Street, Boston, Mass.

47 GENTLEMEN: We herewith acknowledge receipt of yours of the 17th inst., also transfer of contract from the Guerini

Stone Company as originally signed to the Guerini Stone Company recently incorporated, which will be satisfactory.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.

(Signed) J. P. CARLIN.

J.P.C/K.M.Z.

EXHIBIT 4 FOR P'T'FF, # 891.

Postal Telegraph—Commercial Cables.

Telegram.

#2397.

24 B cy 10
BR New York, Jan 10-11

7 Weir St., Taunton, Mass.

Guerin Stone Co., Middleboro, Mass.:

Send bond for porto rico immediately work must start at once.

P. J. CARLIN CONST'N CO.

6-18 pm
(Phoned 6 24 pm)

After receiving this telegram, we obtained our bond and sen*d* it to the Carlin Company, and in the middle, or latter part of January went to New York an consulted with the Carlins regarding commencing and proceeding with the work.

They advised us that the work must proceed at once and wanted us to get on the job. We immediately started our arrange-
48 ments, and in the early part of February, Mr. Guerini and one moulder started for Porto Rico, and a week or two later, Mr. Follett and I started for Porto Rico, where I remained six weeks, during which time we were doing the preliminary work that had to be done. When I arrived, however, little work had been done on the Federal Building, and we were unable to do any work whatsoever on the building itself. On my return to New York, I saw Mr. Joe Carlin, and stated to him that they would have to do rapid work, if we were not to be kept waiting around. About the first of June, I made a second trip to Porto Rico, and at that time, very little work had been done on the foundations by the Carlin Company, so that the Guerini Company was unable to make any material progress under their contract.

The following correspondence was then properly identified by the witness, offered in evidence, and was admitted and received in evidence without objection and marked Exhibits 5, 6, 7, 8, 9, 10, 11, and 12 for the Plaintiff.

EXHIBIT 5 FOR P'T'FF, #891.

The P. J. Carlin Construction Co.,
Building Contractors,
No. 16 East 23rd St.

Telephone 5226, 5227, Gramercy.

NEW YORK,
SAN JUAN, PORTO RICO,
Sept 27th 1911.

The Guerini Stone Co., San Juan.

GENTLEMEN: In accordance with your contract, with the P. J. Carlin Consn. Co., on the P. O. & Courthouse at San Juan, Porto Rico, you are hereby notified to proceed with the walls on
49 the approaches and areas on the exterior of the Building, as fast as foundations for same are placed. You are aware, of course, that part of these foundations are already in.

Very truly yours
(Signed) D. P. OAKSMITH, *Sup't.*

EXHIBIT 6 FOR PL'FF, #891.

J-2397.

Oct. 21, 1911.

P. J. Carlin Const. Co., New York City, N. Y.

GENTLEMEN: Under date of October 13th we are advised by our San Juan Office that they have not been able to commence work up to that date on our concrete work, as the job was not ready for it. They also state that they started to set granite in the southwest corner, but on account of some question as to measurements, were unable to proceed with the work. They then started to set granite on the southeast corner on the morning of Oct. 13th and found that there was some question for Mr. Stierle and Oaksmith to settle at this point.

You will note therefore that up to Oct. 13th they have been unable to proceed with our work, owing to the fact that it is not ready for us. As we have a time contract with you, it is very important that the building should be turned over to us in such quantities as to enable us to proceed with the work continuously and at such rate as will secure our completion within the terms of the contract.

Yours truly,
GUERINI STONE COMPANY.

H.P.C./S.

50 EXHIBIT 7 FOR P'T'FF #891.

J-2397.

Nov. 15, 1911.

The P. J. Carlin Const. Co., 16 East 23rd St., New York City, N. Y.

GENTLEMEN: Your favor of the 14th inst. and copy of letter sent direct to our San Juan Office is received and we will of course await reply from San Juan, but the delivery of the stone and hold ups which we have had on setting same would certainly make it impossible for us to have made very much progress.

We understand that Mr. Stierle had recently objected to the size of the stone in one portion of the building and that there has been a holdup at this point. We cannot be jumping from one part of the building to another and from one class of work to another, without being very seriously delayed and without causing you considerable additional expense. We shall certainly do all that — can reasonably be expected to in order to hasten the completion of the work, as it is very expensive for us to have the job progress so slowly as it has progressed in the last ten or eleven months.

Yours truly, GUERINI STONE COMPANY.

H. P. C./S.

51 EXHIBIT 8 FOR P'T'FF, #891.

J-2397.

Dec. 8, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Please wire us tomorrow if all granite and materials are delivered at the San Juan Post Office in sufficient quantity so that we can complete up to the top of granite wall and start our concrete work, as we shall send down several men to reinforce our present force, but we do not want to send them down if they are waiting around and doing half time work on account of lack of material or for any other reason beyond our control.

Do you know of any reason why the work cannot be begun in a large way and continued without interruption to completion?

Yours truly, GUERINI STONE COMPANY.

H. P. C./S.

52 EXHIBIT 9 FOR P'T'FF, #891.

J-2397.

Dec. 19, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: In accordance with the terms of contract, please send us your form blanks for application for payments.

Yours truly, GUERINI STONE COMPANY.

H. P. C./S.

EXHIBIT 10 FOR PL'FF, #891.

The P. J. Carlin Construction Co.,
Building Contractors,
No. 16 East 23rd St.

Rec'd J. A. M., Dec. 21, 1911.
Referred to H. P. C.
Noted —.

J-2397.

NEW YORK, Dec. 20, 1911.

Guerini Stone Co., #88 Broad Street, Boston, Mass.

GENTLEMEN: Replying to yours of the 19th instant, we are enclosing herewith 12 form blanks for application or payments. Please note that these are printed in copying ink, and will yield copy under press.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.
O. SIEGMANN.

O. S./L.
Enc. (12).

53 EXHIBIT 11 FOR P'T'FF, #891.

NEW YORK, Dec. 30, 1911.

To Messrs. P. J. Carlin Const. Co., 16 East 23rd Street, New York.

GENTLEMEN: We hereby make application for payment on account of concrete and granite setting contract on San Juan, P. R. Post-Office Job.

Amount of Original Contract	$64,500.00
" " Extra	$.....
" " "	$.....
" " "	$.....
Total	$.....

Referred to —— ——.
Received Jan. 15, A. M.
Disposition ——.
Answered ——.

Amount of work completed to date		$5,488.00
Cash Received	$.....	
Chanrges	$.....	
Amount 15% Reserve	$823.20	823.20
		$4,664.80
Total		$.....

In addition we set to date 2,473 sq. ft. of granite at 40¢. 989.20
Amount of this application..... $5,654.00
Date of Contract, San Juan, P. R. —.
Very truly yours, GUERINI STONE CO.,
G. A. FOLLETT, *Agent.*

Received Aug. 20, 1912.

P. J. CARLIN CONST. CO.,
Per —— ——.

Application for payment must be in this office not later than the 2nd of the month.

54 EXHIBIT 12 FOR PL'FF, #891.

J-2397.

Jan. 16, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: We are just advised by our San Juan office that they have submitted an estimate of the work done on the San Juan Post-Office Job, but that your representative will not O. K. it until he knows the total number of yards of concrete in the whole contract.

We are sending to our representatives the total number of yards of concrete in the contract but do not feel that your representative should withhold his O. K. on the quantities of work done for any other information. It seems to us that the field force should send these quantities to you at once and your office and our office can settle any details which may be in question.

We have already put a large amount of cash into this job and deem it only fair that we should now have a payment on account of work which we have already done. We had expected that we would have payment from you by this time, but it would seem that this is being held up by small question in the field.

Can you not send us a check at this time for work done to the 1st of January? We herewith make application for ten thousand ($10,000.00) dollars.

Yours truly, GUERINI STONE COMPANY.

H. P. C./S.

55 The reason why application was here made for $10,000.00 was, that having done so much work and spent so much money and the matter having run along for a good long time, I thought it was time for them to send us a cheque, and so in an informal way, I suggested that they send us this cheque for $10,000.00.

The following correspondence was then properly identified by the witness, offered in evidence, and was admitted and received in evidence without objection.

EXHIBIT 13 FOR P'T'FF #891.

J-2397.

Jan. 17, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: We enclose herewith application for payment on account of San Juan Post Office Job.

Yours truly,

GUERINI STONE COMPANY.

H. P. C./S.
Enc.

J-2397.

NEW YORK, Jan. 17, 1912.

To Messrs. P. J. Carlin Const. Co., 16 East 23d Street, New York, N. Y.

GENTLEMEN: We hereby make application for payment on account of Guerini Stone Co. contract on San Juan Post Office Job.

Amount of Original Contract		$64,750.00
" " Extra "		.....
" " " "		.....

Granite setting 40% per sq. ft. surface.

Amount of work completed to date			$15,000.00
Cash Received			$.....
Charges			$.....
56 Amount 15% Reserve		$2,250.00	2,250.00
Amount of this application			$12,750.00

Date of Contract Dec. 16, 1910.

Very truly yours,

—— ——.
—— ——.

EXHIBIT 14 FOR P'L'FF #891.

J-2397.

Jan. 23, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: It is now the 23d of January and we have not yet heard from you regarding payment. As it seems impossible up to this writing to get matters satisfactorily arranged with your representative at San Juan, we request that you have a report of the work done and let us arrange matters in a mutually satisfactory way so that we may get our payment.

Please advise us by return mail just what your procedure is to be and we will endeavor to follow yours wishes.

Yours truly,

GUERINI STONE COMPANY.

H. P. C./S.

57 EXHIBIT 15 FOR P'T'FF, #891.

The P. J. Carlin Construction Co.,
Building Contractors,
No. 16 East 23rd St.

Telephone #5226-5227 Gramercy.

J-2397.

Rec'd L. W. R.
Jan. 25, 1912.
Referred to H. P. C.
Noted —.

NEW YORK, Jan. 24, 1912.

Guerini Stone Co., #88 Broad Street, Boston, Mass.

GENTLEMEN: We have yours of January 23rd with regard to monthly payment, and we are still awaiting the monthly estimate of the quantities performed by you under subcontract at San Juan, Porto Rico. In the meantime please let us have a detailed statement from you as to the quantities and unit prices, upon which you based your estimate.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.,
(Signed) J. P. CARLIN, *Secretary.*
J. P. C./L.

58 EXHIBIT 16, FOR P'T'FF #891.

J-2397.

Jan. 27, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your favor of the 24th inst. is received. We note that you are still waiting for monthly estimate of quantities formed by us under sub-contract for San Juan, P. R. Have you instructed your representative to send you quantities? Our Mr. Lootz agreed with him as to work done up to Dec. 30th. There are about 3,500 cubic yards of concrete in our job and this will give an average price of $18.50 per cubic yard for the concrete in place.

We have already put over $20,000 into this job, due very largely to your delay in getting work and materials ready for us. Up to the present date we have not received a cent of money from you and if you think it is a hardship for you to have $35,000.00 worth of material on the job, as we understood you to say to our Mr. Converse, we wonder what you would think if you were sub-contractor and had to spend over $20,000 without any payments on account.

We must insist on being given fair consideration in the handling

and progress of this job. In this connection, we would call to your mind the situation regarding the stone work which we have been setting and which must be set before we can do our exterior concrete work.

By noon of Jan. 15, 1912, the stone was delivered from the
59 Steamer "Luckenback" which was supposed to finish up and include the J course around the main building. No approach stones or sills.

During three weeks preceding this date, the stone on the job could not be set continuously. This necessitated moving the men to a different part of the wall almost after setting each stone and greatly added to the expense of setting. Notwithstanding this fact, the work has continued and all stone which could be set, was set befor the arrival of the "Luckenback."

Our Mr. Lootz got things working smoothly and anything that your local representative desires to bring to our attention, please have him notify our Mr. Follett.

Our Mr. Converse will be going down in the course of a few weeks and if there are any special messages which you wish taken down or any special part of the work which you wish taken up, please notify us, so that Mr. Converse can look after it. It is quite possible Mr. Converse may be in New York next Wednesday, or sometime next week and he will call upon you.

Yours truly,

GUERINI STONE COMPANY.

H.P.C./S.

60 EXHIBIT 17 FOR P'T'FF, #891.

The P. J. Carlin Construction Co.
Building Contractors.
No. 16 East 23rd St.

Telephone 5226-5227 Gramercy. J-2397.

NEW YORK, Jan. 29, 1912.

Rec'd L. W. R.
Jan. 30 1912.
Referred to H. P. C.
Noted ——.

Guerini Stone Co., #88 Broad Street, Boston, Mass.

GENTLEMEN: We acknowledge receipt of yours of January 27th, regarding the San Juan, Porto Rico work.

Since Mr. Converse expects to be here some time this week, we shall take up the matter of payment with him when he comes. Please ask him to bring the necessary corporation authorization to receive same.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.,
(Signed) P. J. CARLIN, *Secretary*.

J.P.C./L.

61 EXHIBIT 18 FOR P'T'FF, #891.

J-2397
Jan. 30, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your favor of the 29th inst. is received. We note that you ask for the necessary corporation authorization to receive payments.

This is to authorize you to make all checks payable to the Guerini Stone Co. and you may hand same to Our Mr. H. P. Converse, who is President and Treasurer, or you may mail same to our address at 88 Broad St., Boston, Mass.

Yours truly,

GUERINI STONE COMPANY.

H.P. C./S.

62 EXHIBIT 19 FOR P'T'FF #891.

Jan. 31, 1912.
J-2397.

P. J. Carlin Construction Co., New York, N. Y.

GENTLEMEN: As per Articles of Organization filed with Secretary of State of the Commonwealth of Massachusetts and Certificate of Incorporation issued by Hon. Wm. M. O'Llin, Secretary of the Commonwealth, Mr. Howard P. Converse is President and Treasurer of the Guerini Stone Co. and is authorized to receive and receipt for all money due the Guerino Stone Co.

At the second annual meeting held January 31, 1912, Mr. Converse was reelected to serve as President and Treasurer for the ensuing year of 1912.

Yours truly,

GUERINI STONE CO.

E. P. B.-K. V. D.

63 I went to New York on or about February 1*st*, 1912, to have an interview with the P. J. Carlin Construction Company for the purpose of insisting on payment in accord with the terms of the contract, and to get the money, and to register an objection to the very slow progress of the work on their part. *Their* was considerable discussion, and we finally got a cheque for $3,700.00 and some odd dollars at that time. We were very much dissatisfied with the amount and at the end of the conversation it was agreed that he would give us certain unit prices which we would use for a basis for applications for payment, and he had typewritten copies made of these prices which we were to submit to them.

The following is a memorandum which Mr. Carlin gave me at that time.

Th*eir* being no objection, the following memorandum was admitted in evidence:

EXHIBIT 20 FOR PL'FF, #891.

Copy.

Schedule of Amounts Covering Each Branch of the Work in Construction Post-office and Court-house Building at San Juan, P. R.

		Contract Unit.
1. Excavation and filling.....	$9,000.00	$1.50 & 60¢ per cu. yd.
2. Concrete footings and Walls to basement level.....	18,000.00	.50 & 35¢ per cu. ft.
3. Exterior and Interior concrete walls, arches and cement work	48,000.00	1.07 per cu. ft.
4. Concrete floors and castings..	37,500.00	45½¢ per sq. ft.

64 The Attorney for the plaintiff then asked the following question:

Q. Now Mr. Converse, will you explain to the jury what that means;

In our contract for the work on the San Juan Post Office Building, we had to build certain exterior and interior concrete walls. The upper walls, exterior walls which rest on the granite which you see there now, were of concrete, artificial stone. Then there were certain interior walls which were partition walls some of which are standing there, which we did. Those exterior and interior walls, arches and cement work, we had taken a unit of $1.07 per cubic foot of material put in the building. Item No. 4 is for concrete floors and casings, that is, for the concrete floor which goes between the beams and the casings or columns. This is to be taken at forty-five and a half cents per square foot floor area.

65 Now, each month we were to render our application in these terms. We were to get forty-five and a half cents per square foot, or we were to make our application at the rate of forty-five and a half cents per square foot of floor area and $1.07 per cubit foot for exterior and interior walls, arches and cement work.

The following documents were then identified by the witness, offered in evidence, and *was* admitted and received without objection:

EXHIBIT 21 FOR P'T'FF, #891.

The P. J. Carlin Construction Co., Building Contractors, No. 16 East 23rd St.

Telephone 5226-5227 Gramercy.

J-2397.

NEW YORK, Feb. 1, 1912.

Guerini Stone Co., #88 Broad Street, Boston, Mass.

Re: San Juan (P. R.) Post Office.

GENTLEMEN: We are in receipt of yours of January 16th regarding a payment on the work done at San Juan, Porto Rico, in the sum of $10,000.

We received an application from your representative, Mr. Follett, at Porto Rico, in the sum of $5,654.00 representing the value of the work done to January 1st. Our representative sends us the quantities as follows:

343 cu. yds. Concrete	@$10.00	$3,430.00
2,500 sq. ft. Granute (approximate)	@40¢	1,000.00
		$4,430.00
Loss 15%		664.50
Balance due		$3,765.50

What out local office probably told your representative was that they did not know what disposition would be made of the counter charges. It seems that our gravel and sand has been sold to you; that Guerini's personal carelessness had ruined some of the
66 granite by letting other granite fall on that already set, and that there is a charge for engineer hire as well as a charge for some concrete placed by us, in dispute. Not being able, at this time, to determine the amount of these items, and rather than keep you waiting for an adjustment, we enclose check for the above amount.

Will you kindly itemize your application for $10,000.00 for work done up to January 1st, and oblige,

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.,

(Signed) J. P. CARLIN, *Secretary.*

J. P. C./L.
C./C. J. J. C.

EXHIBIT 22 FOR PL'FF, #891.

J-2397.
Feb. 6, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: In accordance with your instruction to Mr. Converse, we have made our January requisition in the units and unit prices used by the government engineer when he makes up the monthly estimates according to your schedule of amounts.

You will note that our contract covers only two items of this schedule to-wit:

#3 Exterior and Interior Concrete Walls and Arches and Cement Work ..... $1.07 per cu. ft.
#4 Concrete Floors and Casings..... .45½¢ per sq. ft.

All the concrete work completed to date comes under item 3 and is so included. We enclose formal requisition for $9,012.50 due us under contract.

Yours truly,

GUERINI STONE COMPANY.

E. P. B.-S.
Enc.

67 EXHIBIT 23 FOR PL'FF, #891.

J-2397.
Feb. 24, 1912.

P. J. Carlin Construction Co., New York City, N. Y.

GENTLEMEN: We hereby request immediate payment of Nine Thousand Dollars on account of Contract for Concrete Work at San Juan Post Office Building at San Juan, Porto Rico.

Very truly yours,

GUERINI STONE CO.

E.P.B./R.

EXHIBIT 24 FOR PL'FF, #891.

J-2397
March 9, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: In reference to the San Juan Job, we must call your attention to the fact that we are not being paid in accordance with the terms of the contract. After several months of endeavor to get payment, it was finally necessary for Mr. Converse to go to New York and at that time he received a check for $3765.50. This was the first payment we have received on account of the large expense we have been put to and it was received Feb. 2d. At that time you had been paid over $13,000.00 for the work we had done. This is manifestly unfair to us. We call for further payment of $9,000.00 and to date we have received no reply.

When our Mr. Converse was at your office Feb. 2d. you gave us a memorandum of prices for the work done on this job, stating that they would be the basis on which we would be paid and
68 to make our application to you on that basis. We have complied with this and yet have not received check. Your delays, both as to payment and progress of the work, are effecting us seriously. More than a year ago you telegraphed, "Work must begin at once." We immediately went to New York and conferred with you and you notified us that we must get our men and equipment on the job at once, which we did.

The labor and materials not included in our contract have been provided in such manner as to cause delay in the material progress of our work and loss to us. Matters have reached such a stage that we insist on payment of $9,000.00 which should have been paid us long ago and in addition to this, payment for work done during February.

As suggested by you over the telephone today, we sent you figures regarding the amounts of work completed. These were given to your Mr. John Carlin the latter part of February, in San Juan.

If these matters cannot be satisfactorily adjusted between us, it will be necessary for us to take it up with Washington. We cannot understand the non-payment to us, when you are collecting on account of work done by us. It seems to us you cannot have realized the loss and delay you have put upon us and believe that upon careful considermation of the whole matter, you will recognize the fairness of our claims.

Kindly let us hear from you at once.

Yours truly,

GUERINI STONE COMPANY.

H.P.C./S.

69

NEW YORK, March 9, 1912.

To Messrs. P. J. Carlin Const. Co., 16 East 23d St., New York, N. Y.

GENTLEMEN: We hereby make application for payment on account of Guerini Stone Co. contract on San Juan Post Office Job:

Amount of Original Contract		$64,750.00
Extra work to your order, Reconstructed Piers		300.00
Granite Setting—3460 sq. ft. at 40c. per sq. ft. surface:		
Amount of work completed to date		$18,237.00
Cash Received	$3,765.50	
Amount 15% reserve	2,737.55	
Total		6,501.05
Amount of this application		$11,735.95

Date of contract Dec. 16, 1910.

Very truly yours,

GUERINI STONE COMPANY.

70 **Copy.**

March 9, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: In addition to the concrete laid on reconstruction work ordered by your San Juan Office, the following work was done during the month of February at San Juan P. O. Blg. up to and including February 27th:

Concrete	105 cu. yds.
Stone set	860 sq. ft.
Total number of cu. yds. laid 573	
" Stone set	3460 sq. ft.

We enclose herewith formal application.

Yourstruly,

GUERINI STONE COMPANY.

H.O.C./S.
Enc.

71 Postal Telegraph—Commercial Cables.

Telegram.

EXHIBIT 25 FOR PL'FF, #891.

Copy.

BOSTON, MASS., March 13, 1912.

P. J. Carlin Const. Co., 16 East 23rd St., New York, N. Y.:

When send check account work San Juan.

GUERINI STONE CO.

Postal Telegraph—Commercial Cables.

Telegram.

EXHIBIT 26 FOR PL'FF, #891.

J-2397.

Z 209 NY 8

Br. NEW YORK, Mar. 13-12.

Guerini Stone Co., 11 Broad St., Boston Ms.:

Necessary for Converse to come here Friday morning.

P. J. CARLIN CONSTN. CO.,
C.

C 1235 pm.

72 Following these telegrams, I went to New York in order to meet and get an adjustment with the Carlin Company. I saw Mr. Carlin Sr. and one of the brothers. We wanted payment

in accordance with the terms of the contract. We stated that it had been agreed what the units were, and they had the accounts of the work done, and we ought to be paid. Mr. Carlin Sr. Objected, and said that work of that character is worth so much, finally saying he would make us a payment of $674.00. He said that his son who would arrange with us about the unit prices was in Porto Rico, but that he would soon return. I objected to the amount of the cheque and left the office, but I took the cheque, as I wanted to get all the money I could.

The following documents were then identified by the witness, offered in evidence, and were admitted and received without objection;

EXHIBIT 27 FOR P'T'FF #891.

SAN JUAN OFFICE, March 9, 1912.

P. J. Carlin Construction Co., San Juan, P. R.

GENTLEMEN: We have been informed in a conversation with your Mr. Oaksmith today that the Supt. of Construction, Mr. Berryman, has received a telegram from the Federal authorities at Washington stating that they have notified the Carlin Construction Co. at New York to suspend all operations on the San Juan P. O. & Court House Building pending further investigation by them of the foundations.

We have not as yet received written instructions from you as to whether we shall or shall not stop our work. Kindly send instructions at once.

If we discontinue our work we shall have a part if our force of men on our hands whom we brought from Massachusetts and whose pay will have to continue while they stay in Porto Rico. On the other hand we have an agreement with these men whereby
73 we can discharge them and pay their passage (equivalent to 2nd class on the N. Y. & P. R. S. S. Line) from San Juan to Boston including their wages during transportation. We make you aware of our position in this Matter as you are responsible for our expenses due to delay caused to us by the suspension of work and so it is your option whether the men shall remain in San Juan on pay or whether they shall be sent to Boston and brought back at some future time in which case the transportation charges as above outlined would have to be paid both ways by you. Please let us have your orders in regard to this matter at your earliest convenience as that will save unnecessary expense to yourselves.

Yours truly,

GUERINI STONE CO.,

(Signed) G. A. FOLLETT, *Agent.*

EXHIBIT 28 FOR P'T'FF #891.

SAN JUAN, March 11th, 1912.

The Guerini Stone Co., 88 Broad St., Boston, Mass., c/o San Juan Office. Mr. G. A. Follett, Ag't.

DEAR SIR: We wish to acknowledge rec't of yours of the 9th inst., in which you speak of a conversation with our Mr. Oaksmith & in which you refer to an order to suspend operations on the B'ld'g which Mr. Berryman Sup't of Constr. has delivered to us, and it is evident from your communication that you wish us to direct you what to do in the matter.

We would, in reply, respectfully refer you to your contract with us.

THE P. J. CARLIN CONSTR. CO.
D. P. J.

J.P.C./D.P.J.

74 EXHIBIT 30 FOR P'L'FF, #891.

SAN JUAN, March 27th, 1912.

The Guerini Stone Co., San Juan Office,

GENTLEMEN: During the time of the suspension of the work by order of the Government beginning March 10th, and until work is resumed, please let us have daily the items of expense to which you may be subjected.

Very truly yours,

THE P. J. CARLIN CONST. CO.

Dict'd
J.P.C./D.P.J.

EXHIBIT 31 FOR P'T'FF #891.

SAN JUAN, P. R., March 29, 1912.

P. J. Carlin Const. Co., San Juan, P. R.

GENTLEMEN: In regard to the situation at the New Post Office and Court House Building at San Juan, P. R. with respect to our contract with you on same, and, in connection therewith our conversations, we find ourselves in the following position. Owing to the indefinite length of time that will be necessary to put the foundations in the condition demanded by th- Government and
75 variously estimated at from four weeks to five months, and owing to a vagueness in our minds as to who is responsible for our money loss caused by this stopping of our work, we find that it is imporatnt for us to guard against any unnecessary expense on our part. In view of this we have decided to return our men brought here from the States for this work, to Boston until

such time as the foundations are completed, the first floor structural steel is in place and the building as a whole is ready for us to continue our work with a reasonable assurance that our work can be pushed without the continual series of delays that we have so far had to undergo. We have immediate use for these men in the States and they will be brought back here as soon as the above conditions have been fulfilled.

We have fourteen men on our payroll who came here from the States and who have been idle for three weeks because of this stop in the work. They are becoming discontented and although they are receiving full time pay they are getting restless and want to return to the States. This is much more important here than it would be in the States as there are no competent carpenters, moulders or concrete men for our class of work among the natives. However if you can arrange with them to work for you until such time as we can profitably put them on our own work we are willing that you should do so with the understanding that you will release them to us at that time and pay us 20% of their payroll in order to cover us for house rent, light, ice etc. which we are supplying to them without charge to them. Please let us hear from you in regard to this as soon as possible as we are planning to have them leave on the boat for New York sailing April 3d.

76 About your request that we should rent you our concrete mixer we will do so for the sum of eight dollars and fifty cents ($8.50) for each week day except holidays from the time you take it until it is returned to us in as good condition as when you take it. This price to include the use of our half yard mixer, electric double drum hoist, concrete elevator with Steel bucket and wire fall, cement storage shed, track and car for taking stone to the mixer and electric wiring and water connection, electric current for operating the mixer and hoist. We do not include the labor or any repair work after you take the outfit.

Yours truly,

GUERINI STONE CO.

EXHIBIT 32 FOR P'T'FF #891.

J-2397.
April 25, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: On March 9th we wrote you a long letter regarding our contract with you on the San Juan Post Office B'ld'g. Up to this writing we have received no reply from you. We have not been paid in accordance with the terms of the contract and although we have endeavored to establish some definite methods to have the payments come to us regularly and on some basis mutually satisfactory, you have each time changed your basis of calculation. The last check you gave us was on a basis of what you thought the work ought to cost, which of course is of no force under the contract.

77 You stated that Mr. Carlin was in San Juan at the time and when he got back the matter would be gone into. We have received no word since he returned several weeks ago.

We have been put to very extra expense on account of your delays and believe that there is no question that the damages we have sustained are so serious as to justify us in terminating our contract. We must insist upon the cost of these delays being arbitrated at once in accordance with the terms of the contract and we can only proceed with the contract on the basis that the damages be now adjusted, so that we can proceed with our work on a new and fresh start.

We must be relieved from all responsibility as to our work cracking, as we understand it does not rest upon foundations as originally called for at the time our contract was made.

We are ready and willing to meet you as far as possible, but are unwilling to bear expenses which are caused by your inability to let us proceed with the work in a reasonable and consecutive manner as required by the contract.

Please note that correspondence should be mailed to this office, except such small matter- as directly concern the work in the field.

We understand that you asked our men in the field something about expenses for delays, but it is very indefinite as to what you refer to and our men in the field are not the ones to be applied to in such matters. Your New York office should write this
78 office regarding any important matters regarding the contract.

Yours truly,

GUERINI STONE COMPANY.

H.P.C./S.

EXHIBIT 33 FOR P'T'FF #891.

The P. J. Carlin Construction Co.
Building Contractors.
No. 16 East 23rd St.

Telephone 5226-5227 Gramercy.

NEW YORK, April 23, 1912.

Guerini Stone Co., 88 Broad Street, Boston, Mass.

Attention of Mr. H. P. Converse.

GENTLEMEN: We have yours of April 25th, with regard to the San Juan Post Office. Any time you call at this office we shall be glad to go over the subject with you, but please telephone or write, making an appointment.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.

(Signed) J. P. CARLIN, *Secretary.*

J.P.C./L.

About the time of this latest correspondence, Mr. Bliss, Secretary of the Guerini Stone Company and myself met in New York the

representatives of the Carlin Company at their office. We talked first with Mr. Joe Carlin and later with his father, and with his uncle Mr. John Carlin. This was about May 11th.

79 The following documents were then identified by the witness, offered in evidence, and were admitted and received without objection;

EXIBIT 34 FOR P'T'FF #891.

J-2397.
May 2, 1912.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your letter of April 27th is received. It seems to us that our letter of April 25th shows clearly the necessity of having our matters on the San Juan Job settled without further delay.

It is difficult to say when we can get to New York, and we have already made quite a nember of trips to your office.

Please write us what you wish to do regarding our coming to an agreement on these matters. We would suggest that you pay us what we have already put into this job, and you complete the work. This will leave the whole matter in your hands and you can arrange with the Government regarding your damages to suit yourself.

If this does not meet your views and you prefer to have arbitration in the matter, please advise us to that effect, stating definitely that you will arbitrate the matter and just what points are to be arbitrated. We think many of these matters should be straightened out by correspondence before a personal meeting, so that when we do meet, the matter can be close- in a few minutes.

Yours truly,

GUERINI STONE COMPANY.

H.P.C./S.

80 We discussed the lack of payment and insisted that we should be paid in accordance with the terms of the contract, and that we were being delayed, and that through their delay in supplying material and labor we had been put to very considerable loss and damage. They said they were not responsible anyway; rather side-stepping any responsibility, and finally suggested that I state how much we had spent on the job. I stated we had spent around Thirty-Five Thousand Dollars in actual cash on the job. They said "if that is it, you know what you can do."

The following documents were then identified by the witness, offered in evidence, and were admitted and received without objection:

EXHIBIT 36 FOR P'T'FF, #891.

(Registered mail Receipt No. 41979 attached, dated Boston, Mass., May 28, 1912.)

J–2397
May 22, 1912.

P. J. Carlin Construction Co., New York, N. Y.

GENTLEMEN: In January and February of 1911, after consultation with you in your office in New York, you insisted on our starting work on the San Juan Job and stated that the granite base would be up and ready for our work by June 1st, we then sent men, tools and equipment to the job, as required by you and since that time have been at all times prepared to execute our contract with you.

81 We proceeded with the making of moulds and throughout the balance of the year 1911 we were delayed in proceeding with the completion of our contract by the non-arrival of the granite. This was not finally delivered in such quantities as to allow us to proceed with the concrete work, which rests directly on the granite, until February of 1912, and even at that time, there were some important omissions.

About the first week of March, 1912, we were again required to stop work, owing to changes to be made in the foundations of the building and we understand that it would be impossible for us to again begin work for at least four to six months. We continually called your attention to the interruption in our work caused by these delays and the very considerable cost and damage to us caused by your breach of contract. Furthermore, during the whole of this time we have been unable to get payments from you in accordance with the terms of the contract. During our last conversation with you at your office, May 11th, we urged that this matter of damages be arbitrated, but you refused to agree to this, and you could give us no assurance that even now we would have an opportunity within any reasonable time to proceed with our work.

Under these circumstances and owing to your entire failure to comply with the terms of the contract, we hereby notify you that we now terminate the contract and shall proceed no further with the work, and that we shall hold you liable for damages we have sustained by reason of your breach of contract, including your failure to provide labor and materials not included in the contract with us in such manner as not to delay the material progress of our

82 work and your failure to make payments in accordance with the terms of the contract, and all other breaches of contract on your part.

Yours truly,

GUERINI STONE COMPANY.

H.P.C./S.

(Registry Return Receipt No. 41979 attached, dated May 29, 1912, received by P. J. Carlin Const. Co., per F. J. Lovering.)

COPY

EXHIBIT 37 FOR THE P'T'FF, #891.

The P. J. Carlin Construction Co., Building Contractors, No. 16 East 23rd St.

Telephone 5226-5227 Gramercy.

NEW YORK, May 31, 1912.

(Rec'd Jun- 1, 1912, referred to H. P. C. Office.)

Re: San Juan (P. R.) Post Office.

Guerini Stone Co., #88 Broad Street, Boston, Mass.

GENTLEMEN: We have yours of May 22nd, 1912, received on May 29th, in which you abandon your contract for the cast concrete and other work in the San Juan Post Office and Court House. Said letter is a breach of contract on your part, and we shall immediately proceed to have the work done by other parties, and shall charge you with the additional expense, if any, above your contract price.

Very truly yours,

83 P. J. CARLIN CONSTRUCTION CO.,

(Signed) J. P. CARLIN, *Secretary.*

J.P.C./L.
C./C. O. D.P.O.

I have been estimating on contract work since 1887, in large work covering practically the whole of the United States and outside. When contractors go to work to estimate the cost of a building which is to be constructed, they take the plans, and take off the quantities shown on the plans and as called for in the specifications, taking off the quantities on to estimating sheets, on which they are figured up and summarized. At the end of the process, you get a final sheet summarizing the quantities and the different classes of work to be done on the building, and you then put your unit prices, being your estimates of doing that particular class of work, carry out your multiplication, and add up the result. In arriving at unit prices, cost of labor in each particular locality is analyzed, cost of materials. If concrete, cost of broken stone, cement, sand delivered on the site, lumber, wage conditions, carpenter's wages, brick mason's wages, and putting all these things together get at the result. I have made three trips to Porto Rico aside from this one, putting in altogether sixty-six days. Our total estimate of the total cost to us of the Guerini Stone Company's work under the ontract on the Federal Building was $53,012. Under the contract we were to be paid $64,750. Our estimate was based on our knowledge of local
84 consitions, and based on the actual cost of work actually done on the Federal Building itself, which has proved correct when actually doing the work, not in interims, or loafing around. If we had been allowed to proceed with the work under the contract, it is

my opinion that our estimate would have proved fair. The difference between these figures represents our anticipated profits. If we had been allowed to complete our contract under the ordinary and customary conditions in the building trade as they are understood and recognized, we should have made a profit of $9,700 and some odd.

I am familiar with the plan of the Federal Building, the character of the labor and materials to go into it. If the work could be continued from now on on the Federal Building as rapidly as under normal conditions it can be done, and assuming that the trouble with the foundations is now absolutely cured, we could finish our work under the contract in about three hundred days, assuming that we could be able to go ahead now without interruptions. The ability to go ahead without interruption in pouring concrete is absolutely the A.B.C. of the building business. Repeated interruptions create great delay, additional expense and interfere vitally with the work.

Cross-examination by Mr. DEXTER:

I am not an engineer, but I have had a large experience as a practical steel constructor since the year 1887 in all classes of structures, including many large concrete structures. I have had experience in granite setting, and in furnishing artificial concrete, perhaps not under these particular specifications or mixtures or ingredients as specified by the Government. Mr. Guerini had a great deal of
85 experience with regard to this class of artificial sand stone, and this was one reason why he went into the contract. I was told in February that the granite would be in San Juan by June. At that time I did not know that our company would set it, but knew that the Carlin Company had the option of having us do it. Before the Guerini Stone Company could do any actual construction work it was necessary for the excavations for the foundations and the foundation footings to be put in. Considering that the foundation footings were begun about the first of January, I should not think it a reasonable time to complete them as late as the month of July. I should think they should be put in in three months. Half the time.

I knew that the plans required that the foundations should rest upon piles, and when I left New York, I thought that the foundations could be completed in three months after my arrival. We had nothing to do with the foundations and I do not know what the problemns were. The first actual work which the Guerini Stone Company had was the concrete which came immediately above that work supplied by the Carlin Company. We were to place our concrete at the point where the Carlin Company left off. The making of moulds for the imitation sandstone was an important part of our work. Mr. Guerini attended to that. They were for the making of the structure above the granite which could not be set until the granite had been set for the basement floor. We had to put in concrete backing to the granite for the basement floor. My second trip to Porto Rico was the latter part of April, or the first of May. Very

little progress had then been made on the building. A large part of our moulds were then made. We had expert men here on
86 the job. I cannot state the number without referring to the pay-roll. There would be only one head man in each department. The Carlin Company wrote some letters saying that we were not going ahead fast enough, covering up the facts thereby that they were not delivering the stone so that we could set it continuously. It is true that the granite pieces sometimes arrive not cut in accordance with drawings, but there should not be a large amount of it. *There* to-day is pretty largely done away with.

The first concrete work which the Guerini Stone Company had to do was the backing of the granite, and in some places, there was concrete up to the point where the granite commenced, but on top of the foundation, that is, where owing to the inequality of the ground surface part of the wall would be obscured from view, this was built of concrete and not of granite. It was a very small matter; a mere spoonful of concrete.

Thereupon, further to maintain the issues upon its part, the plaintiff called and produced as a witness GEORGE BERRYMAN, who after being duly sworn, testified as follows:

Direct examination by Mr. PAINE:

My name is George R. Berryman, I live in San Juan, and I am Superintendent of Construction for the Federal Government, officially in charge of the Federal Building in San Juan.

Thereupon, counsel for plaintiff asked the following question:

Q. Can you testify as to the amounts that have been paid by the United States Government to this P. J. Carlin Construction
87 Company covering the work done on the Federal Building by the Guerini Stone Company?

to which counsel for defendant objected on the ground that it was immaterial, and the objection was over-ruled by the Court and exception noted.

The Government paid for concrete walls and finish above the basement floor line, which would be within the Guerini Contract $15,412.50, minus 10%, which is always retained to the end of a job, and then a balance which included some beam casings or $1,125.00 less 10%. The amount paid corresponding to the work done by the Guerini Stone Company in granite setting would be $2,850.

I came to Porto Rico on the 25th of January, 1912. At that time the building had advanced to about the point where it is now. The granite work is now practically finished. I ascertained that the foundations had settled. There were variations in the foundation work from the specifications between the Government and the Carlin Construction Company. From March 9th, 1912, up to the 10th of this month, November, conditions were such that it was impos-

sible for the Guerini Stone Company to continue with their work under the contract. Assuming that the work is now carried on with reasonable diligence and speed it will be the last of 1913 before the Federal Building will be completed.

Cross-examination by Mr. DEXTER:

On cross-examination, the following question was asked by counsel for defendant:

"As a result of the settling of the foundation Mr. Berryman, is it not a fact that the Federal Government, or the Government
88 of the United States has ordered additional work or changes upon the foundations as originally planned?

To this question, counsel for plaintiff objected on the ground that any material alteration or variation in the contract between the defendant company and the United States was not binding on the plaintiff company, and could not change the relations, rights and obligations between plaintiff and defendant arising out of the sub-contract between plaintiff and defendant.

Full argument was had on this point, and the question was taken under advisement by the Court, who finally ruled:

"On December 10, 1910, a contract was entered into between the defendant company, as general contractor, and the United States of America, for the construction of a United States Post Office and Courthouse in the city of San Juan, Porto Rico. Subsequently, and upon December 16, 1910, a contract was entered into between the plaintiff's assignor, as sub-contractor, and the defendant company and James Knox Taylor, who, it is admitted was at that date Supervising Architect of the Treasury of the United States, for the construction of certain portions of the work covered by the general contract.

Various delays thereafter occurred in the construction of said building, and it is contended by each of the parties hereto that these delays were caused in part or in whole by the default or failure of the other, up to a period ending on the 9th day of March, 1912, upon which date, the general contractor, the defendant here, was notified by the Supervising Inspector of said building, representing the Government of the United States, to cease work upon said building, for the reason that it had been ascertained that certain defects in the foundation of the building existed under plans which had been attached to the original contract, which it was then desired to remedy and change. Thereupon, the defendant, as general contractor, notified the plaintiff, as sub-contractor, to cease the performance of any work upon said building.

It is also admitted that plaintiff company had knowledge of the existence of a contract between the defendant and the United States of America covering the building in question, which was the subject of its sub-contract, and the presumption of law therefore arises that it had knowledge of the provisions of the general contract, among which was a provision beginning upon line 28 of page 6 of

the general contract, as follows, the same, while not having
89 been formally introduced, is considered to be introduced for the purposes of this motion:

"It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the supervising architect it may be necessary for the purpose or advantage of the work, * * *"

Thereafter, and upon May 22nd, 1912, and during the suspension of work upon said building under the foregoing circumstances, the plaintiff company notified the defendant in writing that, by reason of such delay, and of other breaches alleged to have been committed by the defendant company, it elected to terminate its sub-contract, and thereafter this action was brought by the plaintiff against the defendant for the purpose of recovering for amounts expended by it, together with damages which it alleged had accrued to it by reason of the failures and unwarrantable delays and interference of the defendant, and for sums alleged to be due it for work already performed upon said building and accepted.

It was provided in Sec. 11 of the sub-contract that the general contractors should provide all labor and materials not included in the sub-contract, in such manner as not to delay the material progress of the work, and that in the event of their failure so to do, they should pay reasonable damages in money to the sub-contractor for losses arising therefrom. Similarly, it was provided that the sub-contractor would reimburse the general contractor for any loss occasioned to it by delay of the sub-contractor.

In Sec. 7 of the said contract, provision was made for extension of time of performance in case of failure to complete by reason of delays caused without the neglect, delay or default of the sub-contractor, or by the act of God.

The uncontradicted evidence shows that by, reason of the election of the Government to change the footings of the foundation, it would have been impossible for the sub-contractor to do any of the work contemplated by the said contract between the 9th day of March, 1912, and the 1st day of November, 1912, and in the trial of the cause, upon the putting by counsel for the defendant of a question to plaintiff's witness, Mr. Berryman, the federal inspector of the building, in relation to the changes and alterations in the footings of the foundation, counsel for the plaintiff objected on the ground that it was immaterial, as the sub-contract did not obligate the plaintiff company to do any work upon the footings of the foundation, and that therefore their condition formed no part of the subject matter of the contract, or of the complaint herein.

90 After argument of counsel and careful consideration of all the subject matter, in view of the fact that the plaintiff company must be held to have had knowledge before the execution of its sub-contract, of all the provisions of the general contract, which contained among other things, the provision for the option in the Government to make such alterations in the course of construction as it should deem advisable, and in view of the fact that

the delay in construction from March 9th, 1912 to November 1st, 1912 was wholly involuntary on the part of the general contractor by reason of the provision of option heretofore recited, the objection, in so far as it concerns solely questions as to the exercise of said option on the part of the government, is over-ruled, and the question is permitted to be answered, and an exception."

To this ruling counsel for plaintiff duly excepted.

In reply to the question previously put, the witness testified that on the 9th of March the work was suspended by the Government, and that when work was resumed by order of the Government additional work was started upon the foundations, and this work is now about 85% completed. The United States Government had given an extension of time to the P. J. Carlin Construction Company of six months, and there is now on file a request by them for a further extension of six months.

There had been $15,412.00 paid to the Carlin Construction Company on account of the Guerini Stone Company's concrete work. This unit of price was for walls only, and some of the work was for fifty cents a cubic foot and some for thirty-five, depending on the size of the walls and whether they had reinforcing in them or not. These were walls between the basement floor levels, including plain walls and interior walls. The exterior walls above would call for a greater unit, but there has been no occasion as yet to apply this.

There has been no estimate or allowance for imitation stone
91 work. The former Government Superintendent approved estimate for this work on the basis of $1.07 a cubic foot. This basis was approved and agreed on by the contractors and the former Superintendent as a proper basis, but I used a basis of thirty-five and fifty cents a cubic foot. On my basis the Government has overpaid the Carlins about $8,000.

Redirect examination by Mr. PAINE:

There were variations in the foundations from the specifications in the contract. The P. J. Carlin Construction Company is doing all the work on the foundations as far as the Government is concerned. The work has not been done in accordance with the specifications as to size, in depths, widths and thickness. The character of the concrete and the reinforcing might also be in question. The variations between the foundations as they have actually been put in place and the foundations as called for in the specifications may have caused the settlement of the foundations, and would certainly contribute to the settlement of the foundations later. At this stage, there is very little weight on the walls, and it would be hard to tell which was the cause of the sinking. At the time of the sinking, the building had progressed about twenty per cent in its construction. As the weight of the building increased the probability of sinking would increase tremendously.

Thereupon, further to maintain the issues upon its part, the plaintiff recalled and produced as a witness GEORGE A. FOLLETT, who testified as follows:

As agent of the complainant company on the work I had charge of the disbursements, and by reference to the books and pay-
92 rolls which I have here, I can state the amount of pay-rolls actually paid out by the San Juan office of the Guerini Stone Company to be $11,687.21. This covers the actual number of hours spent each day by each man. From the vouchers which I have here, I can testify that the labor pay-roll paid at the Boston office of the Guerini Stone Company on account of this job amounts to $2,794.56. My salary and expenses up to the first of January of this year, at which time I was put on a salary basis amounts to $2,893.85.

The freight bills and passenger fares paid at the Boston office to the New York & Porto Rico Steamship Company according to the vouchers which I have here amount to $1,117.23.

This includes freight on our machinery and tools and various materials, also traveling expenses of men brought down from the North who were specialists in the making of concrete and placing it, and carpenters to whom we had to pay their traveling expenses. From the vouchers, I can testify that we paid passenger fares for sending men back to Boston in the sum of $710.00; for lumber and hardware, we paid $3,667.53. For broken stone we paid $1,960.87; for cement and plaster we paid $2,843.05; for electricity and installation of motors we paid $401.51. For materials furnished by the Boston office, according to the figures which I have here, we paid $1145.14; for rent of tools and machinery we paid $5,805.00. All our machinery, except small tools, such as shovels and wheel barrows were hired in Boston and shipped down to us for use on this job at a daily rental at the rate of $15.00 a day for all of the
93 machinery. For sand purchased and delivered we paid $419.96 as shown on the cash book which I have here. For freight, express and cartage paid at the San Juan Office we paid $121.28. For miscellaneous expenses and petty cash items we paid $631.69. Last Spring, the defendant got a Court order restraining us from disposing of certain machinery which we were using in connection with our work.

A document headed "Inventory of Property taken over by P. J. Carlin Construction Company from Guerini Stone Company, San Juan, P. R. August 3rd, 1912" was then offered and received in evidence without objection.

EXHIBIT 38 FOR PL'FF, #891.

Inventory of Property Taken Over by P. J. Carlin Construction Co., From Guerini Stone Company, San Juan, Porto Rico, August 3, 1912.

San Juan, August 6, 1912, this List Checked by the P. J. Carlin Const. Co. Per John J. Carlin, Vice Pres., and D. P. Oaksmith Supt., Assisted by Frank Ortiz, of the Guerini Stone Company, and Found as we Have Checked it. The Material Has All Been Used Before and is in Fair Condition.

Aug. 6, 1912.

17 Quilts.
16 Beds.
17 Pillows.
14 Blankets.
12 Sheets.
8 Pillow Cases.
10 Mosquitos nets.
1 Filter.
1 Coil rubber hose—25 ft.
94 1 Coil Roofing paper.
1 Electric Hoisting Machine and steel cable.
1 Elevator and bucket.
1 Stone car and track.
1 Turn Table.
1 Concrete Mixer.
1 Fine concrete mixer.
1 Shed at concrete mixer.
9 Steel wheel barrows.
5 Goose neck bars.
2 Crow bars.
2 Iron blocks.
8 Double blocks.
4 Single blocks.
2 Snatch blocks.
2 Shackles.
2 Chain slings.
3 Chain stone slings Lewis.
1 Hand winch A. Drum.
403 Clamps.
92 Moulds ready for use —? is correct.
1 Hand truck.
13 Bags of asbestoes.
1 Iron cutter.
2 Pots of boiling glue.
1 Oil stove.
9 Barrels and 1 box filled with moulds—? if for this Bldg.
29 Moulds big and small—? if for this Bldg.

2 Coils of 1-inch rope manilla.
4½ Barrels of plaster.
1 Carpenter vise.
1 Small water tank for concrete mixer.
1 Large hammer, Sledge about 15 lbs.
2 Boxes of carborundum stone.
4 5 inches leather belts for machinery shafting, 2 of 3", 1 of 6".
12 Hoes for hand mising concrete.
245 Concrete chisels.
½ Barrel of bolts for elevator.
4 Electric switches.
3 Rolls heavy insulated copper wire.
1 Bundle galvanized wire.
1 Elevator derrick Boom.
2 Dogs.
2 Iron column moulds.
6 Picks.
15 Shovels for spading concrete.
6 Round shovels.
5 Square Shovels.
3 Iron bands (1 x 2 in. 15-20 inches) for splicing Boom.
4 Coils of rubber hose, in rem-ant lengths.
1 Unfinished machine (Claimed by A. Guerini)?
3 Moulds tables.
42 Barrels of white sand.
½ Barrel of glue.
2 Boxes of nails.
4 Rounds saws.
1 Drilling machine.
3 2½ b-ls. hand hammer-.
95 1 Concrete wooden bucket.
1 Skipp.
1 Belt shafting.
1 Elevator wheel.
2 Shackles.
2 Pairs of dogs.
9 Keys for setting stone (2 sets wedge Lewis, 7 extra keys.
1 2½ B-ls. hand hammer.
1 *Zizzers* for cutting tins. Snips.
4 *Renchis* for the electric winch.
2 Wire players.
11 Pieces of tools belonging to machinery.
2 Spirit levels.
2 Level board- (Belonging to P. J. C. C. Co.)
1 Oil feeder.
1 Roll of wrapping paper.
4 Wire clips.

(Signed) THE P. J. CARLIN CONSTRUCTION CO.,
By JOHN J. CARLIN, *Vice-President.*

This list contains all the articles which were left by the Guerini Stone Company when I went North last Summer. I offered part of these articled, that is, the machinery and tools to the Carlin Company for $3,500, and I would say that is a fair price for it as it is on the ground. There are other things in this list besides the tools and machinery.

Cross-examination by Mr. DEXTER:

I am not able to separate from these items in this bill of particulars the items which represent actual labor that went into the building, because we had twelve or fifteen men from the States whose time went on steadily at full pay whether they worked or not. At that time I did not expect to have to keep any separate accounts of that sort, as they had to be paid in any case. I can show you my
96 original entry pay-rolls, where each man is itemized as to the hours he had, and they are paid weekly. There are two or three small items of materials that did not actually go into the building. A considerable portion of the bill of particulars represents expenses for various things that were not incorporated into the building, such as freight and passenger fares.

Redirect examination by Mr. PETTINGILL:

No salary for Mr. Converse is included in these items. No salary to me since the first of July has been included.

At this point there were offered and received in evidence without objection the books of original entry showing all pay-rolls, petty cash items, and the cheques and vouchers showing the other items in plaintiff's bill of particulars, and amended complaint, and corresponding with and equal to in amount and the books and a large envelope containing the cheques and vouchers were marked Exhibit 39 for Plaintiff.

Thereupon, the plaintiff further to maintain the issues on its part re-called the witness H. P. CONVERSE, who testified as follows:

Direct examination by Mr. PETTINGILL:

I am familiay with the machinery which was turned over to the defendant, and from my experience in business know the values thereof. I actually bought many of the different machines myself. In my opinion $3300.00 to $3800.00 would be a fair price for the machinery.

At this point, plaintiff moved to be allowed to amend its com-
plaint so as to conform with the bill of particulars as finally
97 amended, and there being no objection, the motion was granted, and the complaint was amended so as to conform in its allegations of damage and prayer for recovery to the figures contained in its amended bill of particulars.

Thereupon, the defendant to maintain the issues upon its part, produced, and called as a witness JOSEPH P. CARLIN, who, after being duly sworn testified as follows:

My name is Joseph P. Carlin. I am a civil engineer and contractor and president of the P. J. Carlin Construction Company. I am familiar with all the details of the transactions in connection with this contract between the P. J. Carlin Construction Company and the Guerini Stone Company.

Defendant at this point offered in evidence copy of the contract entered into between the Government of the United States and the P. J. Carlin Construction Company for the construction of the building in question. To the admission of this contract, the plaintiff objected on the ground that it was immaterial, as not binding on the plaintiff, in that the relations, rights and obligations between the plaintiff and defendant were covered solely by the terms of the subcontract between them. This objection was over-ruled by the Court and the plaintiff noted an exception.

Defendant then offered in evidence a copy of the specifications and proposal sheet forming a part of said contract. The plaintiff made the same objection which was over-ruled and an exception noted. The contracts and proposals were then placed in evidence as follows:

98 EXHIBIT 1 FOR DEF'T. #891.

San Juan (P. R.) Post-Office and Court-House.

D. M. B.

Proposal Sheet.

N. B.—After this proposal sheet is filled out it shall not be forwarded under frank, but must be detached and forwarded, under separate cover, with postage prepaid by the bidder.

NEW YORK, November 21, 1910.

To the Supervising Architect, Treasury Department, Washington, D. C.

SIR: We hereby propose to furnish all the labor and materials required for the construction, complete (Except elevators) of the United States post-office and court-house at San Juan, P. R., in strict accordance with drawings Nos. 1-A, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, W-36, W-37, W-38, W-39, W-40, 41, and 42, miscellaneous drawings Nos. M-48, M-55, such other drawings and models as may be furnished, the specification dated August 27, 1908, and the addendum dated September 22, 1910, and the instruction of the superintendent, for the sum of: Three hundred and seventy-two thousand dollars ($372000.00/100).

For Alternate A (substituting system of reinforcing concrete, as specified):

Deduct Five Hundred dollars..... ($500.44)—

For Alternate B (substitnting terra cotta flooring and roof arches for concrete, as specified):

Add Three thousand dollars..... ($3000.00)
Deduct ..... (.....)

For Alternate C (Substituting graphite for read lead for painting steel, etc., as specified):

Add Two hundred dollars..... ($200.00)
Deduct ..... ($.....)

For Alternate D (Substituting Keene's cement for plastering, as specified):

Add Fifteen hundred dollars..... ($1500.00)
Deduct ..... ($.....)

99 For Alternate E (extending the time for completion of building until the 1st day of March, 1913):

Deduct One hundred dollars..... ($100.00)

For extending the time for completion to the first day of July, 1913:

Deduct Two hundred dollars..... ($200.00)

For Alternate F (substituting bronze for ornamental iron, as specified):

Add Ninety thousand dollars..... ($90,000.00)

For Alternate G (substituting copper for galvanized metal and tin, as specified:

Add Two thousand dollars..... ($2,000.00)

For Alternate H (substituting concrete for granite, as specified):

Deduct Twelve thousand dollars..... ($12,000.00)

For Alternate I (forming all concrete and the finish, above first floor, in place, as specified):

Add Eight thousand dollars..... ($8,000.00)
Deduct ..... ($.....)

Amount included in the proposal for work in connection with "Approaches":

..... ($.....)

Amount included in the proposal for steel vault, doors, and vestibule:

..... ($.....)

Amount included in lump-sum proposal for work specified under head of "Plumbing", exclusive of plumbing marble and and gas piping:

Thirteen thousand ..... ($13,000.00)

Amount included in lump-sum proposal for all work specified under head of "Gas piping:"

Three hundred and fifty dolars..... ($350.00)

100 Amount included in lump-sum proposal for all marble-work complete in place in all toilet rooms:

Six thousand dollars..... ($6,000.00)

Amount included in lump-sum proposal for all work specified under head of "Conduit and wiring system:"

Fifty-five hundred dollars..... ($5,500.00)

Amount to be added to lump-sum proposal for furnishing structural sanitary glass complete in place, in lieu of marble work specified in toilet room:

..... ($.....)

Amount to be deducted from lump-sum proposal if nonconducting coverings on hot and cold water piping and hot water boiler of plumbing system are omitted:

Five hundred dollars..... ($5,000.00)

Price per cubic yard for filling:

Sixty cents ..... ($ .60)

Price per cubic yard for trench excavation:

One dollar and fifty cents..... ($1.50)

Price per linear foot to be added for piles over 25 feet long:

Thirty cents ..... ($ .30)..

Price per linear foot to be deducted for piles less than 25 feet long:

Twenty cents ..... ($ .20)

Price per pile for additional piles 25 feet long:

Eight dollars ..... ($8.00)

Price per pile to be deducted for omitting piles 25 feet long:

Five dollars ..... ($5.00)

Price per cubic foot for concrete footings:

Not reinforced—Thirty five cents..... ($ .35)
Reinforced—Fifty cents ..... ($ .50)

Price per cubic foot for concrete pile capping:

Thirty five cents..... ($ .35)

Price per square foot for concrete floor in basement:

101 Twenty five cents..... ($ .25)

Price per square foot for concrete floor construction, not including the filling or beam casing:

Thirty five cents..... ($ .35)

Price per square foot concrete filling:

Twenty five cents..... ($ .25)

Price per M for common brick:

Twenty four dollars..... ($24.00)

Price per M for facing brick:

Eighty dollars ..... ($80.00)

Price per square for tin roofing:

Fifteen dollars ..... ($15.00)

Price per square for tile roofing:

Thirty five dollars ..... ($35.00)

Price per square yard for plastering on masonry:

Sixty cents ..... ($ .60)

Price per pound for structural steel:

Six cents ..... ($ .06)

Brand and name of manufacturers of hard proposed to be used:

Acme or Rock Plaster.....

N. B.—Before filling out the following lists of appliances, materials, and fixtures, read carefully "Kind and quality of material", mechanical equipment portion of this specification.

List of Plumbing Fixtures and Materials.

(Here follows the list, which is immaterial to the issues in this cause, and therefore omitted by the request of the attorney.)

102 In determining which is the lowest bid, it is understood that the Government reserves the right in awarding the contract to deduct any separate amount named in the proposal for any item mentioned therein.

Notice.

A certified check much accompany this bid to entitle it to consideration.

P. J. CARLIN CONSTRUCTION CO.
Signature, J. T. CARLIN, *Treas.*
Address, 16 East 23rd St., New York City.

Names of individual members of firm:

Name of corporation, P. J. Carlin Construction Co.
Name of President, P. J. Carlin.
Name of Secretary, J. P. Carlin.

Under what law corporation is organized, State of New York.

San Juan, P. R. JCP GDE LAS L JAW WGN DMB

Contract.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, Dec. 9, 1910.

P. J. Carlin Construction Co., 16 East 23rd Street, New York City.

103 GENTLEMEN: In accordance with Department approval of even date, your proposal of Nov. 21, 1910, the lowest received under advertisement, in total amount three hundred and seventy-four dollars $374,000.00), is accepted, the work to be completed by Nov. 1, 1912, as follows:

To furnish all the labor and materials required for the construction complete (except elevators) of the U. S. Post Office and Court House at San Juan, Porto Rico, in accordance with the specification of Aug. 17, 1910 and the drawings therein named (Except 1 and 28), the addendum to the specification dated Sept. 22, 1910 and drawings 1-A, 41 and 42, such other drawings and models as may be furnished, and the instructions of the Superintendent, for the sum of ..... $372,000.

Plus—Alternate G (Substituting copper for galvanized metal and tin, as specified) ..... 2,000.

Total ..... $374,000.

You are requested to submit drawings and specification illustrating the system of reinforcing concrete proposed by you under alternate A; and the right is reserved to accept your deduction of five hundred dollars ($500.00) on account thereof, provided the system proposed is satisfactory to this Department.

It is understood and agreed that you will execute promptly a formal contract, with bond in the sum of $187,000.00, guaranteeing the faithful performance of the work, a form for which will be forwarded you, and sign the stamped set of the said drawings, with red label, forwarded under separate cover, the contract, bond and drawings to be returned immediately for file in the Office of the Supervising Architect. Your check will be held until the approval of your bond.

Payments for the work will be made from the appropriation for "Post-Office and Court House, San Juan, Porto Rico".

104 Respectfully,

C. D. HILLES,
Assistant Secretary.

H H F JWG JSS CEK JKT

Instructions to Be Followed in Executing the Following Instruments.

(Here follows the instructions, which are immaterial to the issues in this cause, and therefore omitted by the request of the attorney.)

NOTE.—Do not detach any of the papers attached hereto. When this contract and bond have been duly executed and approved, a complete copy will be sent to the contractor.

Contract Between the United States of America and the P. J. Carlin Construction Co.

Whereas, By advertisement, duly made and published according to law, proposals were asked for furnishing all of the labor and materials for the work herein provided for; and

Whereas, the proposal of the P. J. Carlin Construction Co., furnished in response thereto, was duly accepted, as hereinafter stated, on condition that a formal contract be entered into in accordance with the terms of said acceptance:

105 Now, therefore, this agreement, made and entered into by and between C. D. Hilles, Assistant Secretary, by direction of the Secretary of the Treasury, for and in behalf of the United States of America, of the first part, and the P. J. Carlin Construction Co., a corporation organized under the laws of the State of New York and having executive offices in New York, New York, of the second part.

Witnesseth: That the party of the second part for the consideration hereinafter mentioned, covenents and agrees to and with the party of the first part to furnish all of the labor and materials and do and perform all the work required for the construction, complete (except elevators), of the Post-Office and Court-House at San Juan, Porto Rico, including Alternate G (substituting copper for galvanize- metal and tin, as specified); in strict and full accordance with the requirements of drawings numbered 1-A, 2 to 27, inclusive, 29 to 35, inclusive, W-36 to W-40, inclusive, 41, 42, M-48 M-55, and

such other detail drawings and models as may be furnished to the party of the second part by the Supervising Architect of the United States Treasury Department, the advertisement for proposals as modified by the addendum thereto dated September 22, 1910; the specification for the work; the proposal dated November 21, 1910, addressed to the said Supervising Architect by the said party of the second part; and lettter dated December 9, 1910 addressed to the said party of the second part by C. D. Hilles, Assistant Secretary of the Treasury, accepting said proposal; a true and correct copy of each of which said papers is attached hereto, and forms a part of this contract; and which said numbered drawings, bearing the signature of the said supervising Architect and *and* the signature
106 of the said party of the second part, are on file in the office of the Supervising Architect of the United States Treasury Department, and are hereby made part of this contract.

And the said party of the second part further covenants and agrees that the work herein agreed to be performed shall be commenced promptly upon receipt of notice of the approval of the bond hereto attached, and that the same shall be carried on in such order and at such times and seasons, and with such force as shall from time to time be directed or prescribed by the Supervising Architect or his representative, and that the same shall be completed in all its parts by November 1, 1912; that all materials used shall be of the very best quality of their respective kinds; that all the work performed shall be executed in the most skillful and workmanlike manner; that both the materials used and the work performed shall be in every respect to the entire and complete satisfaction of the Supervising Architect; and that the party of the second part shall not, in carrying out the provisions of this contract, employ any person undergoing sentence of imprisonment at hard labor which has been imposed by a court of the United States, or any State, Territory, or municipality having criminal jurisdiction.

And the said party of the second part expressly covenants and agrees that the bond hereto attached shall be security, also for the satisfactory performance and fulfillment of all the guarantees set forth in or required by said specification, proposal or acceptance.

And it is hereby expressly covenanted and agreed by and
107 between the parties hereto that the party of the first part shall have the right—should the Secretary of the Treasury so elect—to deduct five hundred dollars ($500.) from the contract price hereinafter stated, provided the drawings and specifications to be submitted by said party of the second part illustrating the system of reinforcing concrete proposed by said party of the second part is satisfactory to the party of the first part and the use of such to be submitted system of reinforcing ordered.

It is expressly covenanted and agreed by and between the parties hereto that time is and shall be considered as of the essence of the contract on the part of the party of the second part, and in the event that the said party of the second part shall fail in the due performance of the entire work to be performed under this contract, by and at the time herein mentioned or referred to, the said party

of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of fifty dollars, for each and every day the said party of the second part shall be in default, which said last-named sum per day, in view of the difficulty of estimating such damages with exactness, is hereby expressly fixed, estimated, computed, determined, and agreed upon as the damages which will be suffered by the party of the first part by reason of such default, and it is understood and agreed by the parties to this contract that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due, or to become due, to the said party of the second part, or to sue for
108 and recover compensation or damages for the nonperformance of this contract at the time or times herein stipulated or provided for.

The party of the second part further covenants and agrees to hold and save the United States, its officers, agents, servants, and employees, harmless from and against all and every demand, or demands, of any nature or kind, for, or on account of, the use of any patented invention, article, or appliance, included in the materials hereby agreed to be furnished under this contract.

It is further covenanted and agreed by and between the parties hereto that the said party of the second part will, without expense to the United States, comply with all the municipal building ordinances and regulations, in so far as the same are binding upon the United States, and obtain all required licenses and permits, and be responsible for all damages to person or property which may occur in connection with the prosecution fo the work; that all work called for *be* drawings and specifications, though every item be not particularly shown on the first or mentioned in the second, shall be executed and performed as though such work were particularly shown and mentioned in each, respetively, unless otherwise specifically provided; that all materials and work furnished shall be subject to the approval of the said Supervising Architect; and that said party of the second part shall be responsible for the proper care and protection of all materials delivered and work performed by said party of the second part until the completion and final acceptance of same.

It is further covenanted and agreed by and between the
109 parties hereto that the said party of the second part will make any omissions from, additions to, or changes in, the work or materials herein provided for whenever required by said party of the first part; the valuation of such work and materials to be determined on the basis of the contract unit of value of material and work referred to; or, in the absence of such unit of value, on prevailing market rated; which market rates, in case of dispute, are to be determined by the said Supervising Architect, whose decision with reference thereto shall be binding upon both parties; and that no claim for damages, on account of such changes or for anticipated profits, shall be made or allowed.

It is further covenanted and agreed that no claim for compensation for any extra materials or work is to be made or allowed, unless the same be specifically agreed upon in writing or directed in writing by the party of the first part; and that no addition to, omission from, or changes in the work or materials herein specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occassioned, as the case may be, shall be added to or deducted from the amount of the contract; and, in the absence of an express agreement or provision to the contrary, no addition to, or omission from, or changes in the work or materials herein specifically provided for shall be construed to extend the time fixed herein for the final completion of the work.

It is further covenanted and agreed by and between the parties hereto that all materials furnished and work done under this contract shall be subject to the inspection of the Supervising
110 Architect, the superintendent of the building, and of other inspectors appointed by the said party of the first part, with the right to reject any and all work or material not in accordance with this contract; and the decision of said Supervising Architect as to quality and quantity shall be final. And it is further covenanted and agreed by and between the parties hereto that said party of the second part will without expense to the United States, within a reasonable time to be specified by the Supervising Architect, remedy or remove any defective or unsatisfactory material or work; and that, in the event of the failure of the party of the second part immediately to proceed and faithfully continue so to do, said party of the first part may have the same done and charge the cost thereof to the account of said party of the second part.

It is further covenanted and agreed by and retween the parties parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

It is further covenanted and agreed that the party of the first part have the right to require that any particular portion of the work herein provided for shall be completed within such time as may be hereafter definitely specified by the said party of the first part in written notice to the said party of the second part; and that should the said party of the second part fail to comp-ete such particular portion of the work within the time so specified, or fail to
111 complete the entire work contemplated by this contract within the time or times herein stipulated or provided for; or fail to prosecute said work with such diligence as in the judgement of the party of the first part will insure the completion of the said work with'n the time hereinbefore provided, the said party of the first part may withhold all payments for work in place until final completion and acceptance of same, and is authorized and empowered, after eight days' due notice thereof in writing, served personally upon or left at the shop, office, or usual place of abode, or with the agent, of the said party of the second part, and the said party of the second part

having failed to take such action within the said eight days as will, in the judgment of the said party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials, and tools, of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part shall be further liable for any damage incurred through such default and any and all other breaches of this contract.

It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the Supervising Architect it may be necessary for the purposes or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work, the same to be ascertained by the Supervising Architect; and a similar allowance of extra time will be made for such other delays as the Supervising Architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided, further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States.

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And the said party of the first part, acting for and in behalf of the United States, covenants and agrees to pay, or cause to be paid, unto the said party of the second part, or to the heirs, executors, administrators, or successors, of the said party of the second part, in lawful money of the United States, in consideration of the hereinrecited covenants and agreements made by the party of the second part, the sum of three hundred and seventy-four thousand dollars ($374,000); such payment to be made as prescribed on page five of said specification, and all of the retained percentage of said price shall be forfeited by said party of the second part in the event of the non-fulfillment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for any and all damages sustained by reason of any breach of this contract; provided, however, that no payment hereunder shall be due to the said party of the second part until every part of the work to the point of advancement reached—on account of which payment is claimed—shall be found to be satisfactorily supplied and executed in every particular and any and all defects therein remedied to the entire satisfaction of the said party of the first part.

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It is an express condition of this contract that no Member of, or Delegate to, Congress, or Resident Commissioner, or other person whose name is not at this time disclosed, shall be admitted to any share in this contract, or to any benefit to arise therefrom; and it is further covenanted and agreed that this contract shall not be assigned.

In Witness Whereof, The parties hereto have hereunto subscribed their names this 12th day of December, A. D. 1910.

The erasure of all of lines 26 to 31, inclusive, page 7, and the enterlineation in line 22, page 2, were made before the execution hereof.

All erasures, alterations, and interlineations to be noted here before execution.

We hereby certify that this contract and bond have been correctly prepared.

JAS. A. WETMORE,
Chief of the Law and Records Division.
J. W. GINDER,
Acting Superintendent of Computing Division.
____ ____,
Chief of Inspection Division.
C. D. HILLES,
Assistant Secretary, by Direction of the Secretary of the Treasury.

C.E.K. J.K.T.

P. J. CARLIN CONSTRUCTION CO., [SEAL.]
P. J. CARLIN, *Prest.*

Two witnesses:

114 Witness to the signature of the Contractor:
OTTO SIEGMAN,
F. C. BARNES.

J. C. CARLIN, *Secty.*

Contractor. (Place corporate seal here.)

Note.—Read rules carefully before executing.

Bond.

Know All Men By These Presents, That we, the P. J. Carlin Construction Co., a corporation organized under the laws of the State of New York and having executive offices in the City of New York, County of New York and State of New York, principal, and Andrew D. Baird of the City of New York, County of Kings and State of New York, and Patrick J. Carlin of the City of New York, County of Kings and State of New York, sureties, are held and firmly bound unto the United States of America in the sum of one hundred eighty-seven thousand dollars ($187,000), lawful money of the United

States, for the payment of which, well and truly to be made to the United States, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of December, A. D. 1910.

The Condition of the Above Obligation Is Such, That whereas the said P. J. Carlin Construction Co., has entered into a certain contract, hereto attached, with the United States, bearing date the 12th day of December, A. D. 1910: Now, if the said P. J. Carlin Construction Co. shall well and truly fulfill all the covenants and
115 conditions of said contract, and shall perform all the undertakings therein stipulated by it to be performer, and shall well and truly comply with and fulfill the conditions of and perform all of the work and furnish all the labor and materials required by any and all changes in, or additions to, or omissions from said contract which may hereafter be made, and shall perform all the undertakings stipulated by it to be performed in any and all such changes in, or additions thereto, notice thereof to the said sureties being hereby waived, and shall promptly make payment to all persons supplying labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue.

In Testimony Whereof, The said P. J. Carlin Construction Co., principal, and Andrew D. Baird and Patrick J. Carlin, sureties, have hereunto subscribed their names and affixed their seals the day first above written.

The erasure in line 6, page 9, was made before the execution thereof.

(Place Corporation Seal here.)

P. J. CARLIN CONSTRUCTION CO.,
P. J. CARLIN, *Prest.*, [SEAL.]
JOSEPH C. CARLIN, *Secty.*
ANDREW D. BAIRD. [SEAL.]
PATRICK J. CARLIN. [SEAL.]

Two witnesses to each signature:

Signed, sealed, and delivered in presence of—

OTTO SIEGMANN,
F. C. BARNES.
OTTO SIEGMANN,
F. C. BARNES.

(Seals of wax or wafer.)

NOTE.—Read rules carefully before executing.

116 TREASURY DEPARTMENT.

Office af the Supervising Architect.

Form 8651.—Ed. July 7-10-3,000.

Certified Copy.

Contract of P. J. Carlin Construction Co., #16 East 23d Street, of New York, N. Y., for Construction, Complete, for U. S. P. O. & Ct. H., San Juan, P. R.

Dated December 12, 1910.
Amount, $374,000.00.
Aud O Su Contr D/A.

TREASURY DEPARTMENT,
OFFICE OF THE SUPERVISING ARCHITECT,
December 23, 1910.

Respectfully referred to the Solicitor of the Treasury for examination and indorsement.

CHARLES E. KEMPER,
Executive Officer.

J.A.W.

C.S.J.

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF THE TREASURY,
Dec. 23,1910.

I have examined the within instruments as to form and execution, and in these respects they are approved.

F. A. REEVE,
Assistant Solicitor of the Treasury.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
December 23, 1910.

By direction of the Secretary, the within bond is hereby approved.
December 23, 1910.

C. D. HILLES,
Assistant Secretary.

J.A.W. C.E.K. J.K.T.

R.E.McC.

TREASURY DEPARTMENT,
OFFICE OF THE SUPERVISING ARCHITECT,
January 5, 1911.

I hereby certify that the within papers are true and correct copies of the originals on file in this Department.

(Signed) CHAS. E. KEMPER,
Executive Officer.

117 EXHIBIT 2 FOR DEFT., #981.

Proposals for the Construction Complete (Except Elevators) of the U. S. Post-Office and Court-House at San Juan, P. R.

Washington Government Printing Office, 1908.

118 *Invitation for Proposals.*

TREASURY DEPARTMENT,
OFFICE OF THE SUPERVISING ARCHITECT,
WASHINGTON, D. C., September 22, 1910.

Sealed proposals will be received at this office until 3 o'clock p. m. on the 22d day of November, 1910, and then opened, for the construction, complete (except elevators), of the United States post-office and court-house at San Juan, P. R., in accordance with the drawings and specifications, copies of which may be had at the office of the custodian of site, San Juan, P. R., or at this office, at the discretion of the Supervising Architect.

JAMES KNOX TAYLOR,
Supervising Architect.

J. W. G. G. W. S.
J. C. P. E. C. R.
L. A. S.

N. B.—Bidders are required to return drawings and specifications without marks, notes, or other mutilations thereon.

The government frank sent to intending bidders is to be used only for the return of drawings and specifications.

The estimate for the work is approximately $375,000.

General contractors who desire to submit lump-sum bids will be furnished with one set of drawings and specification free, and one additional set will be furnished such contractor upon the
119 receipt of a certified check for $100, the proceeds of which will be retained until the return of the drawings and specifications in good condition to this office.

NOTICE.—There is on file in the plan room of the Supervising Architect's office a set of the drawings and specification for general use of subcontractors, etc.

59941—10

Addendum to the Specification.

All work is to be executed in strict accordance with the specification, dated August 27, 1908, except as modified by this memorandum specification, attention being called to the fact that drawing No. 1 is superseded by drawing No. 1-A, that drawing No. 28 has been omitted, and drawings Nos. 41 and 42 have been added.

The piling are to be of local wood and have concrete cap. The piles shall be perfectly straight and free from defects and all bark shall be removed. The upper end shall have wrought-iron ring at least ½ by 2½ inches, and all piles must be provided with approved metal points. They shall be driven in the same manner as is required for concrete pile, using the following formula for ascertaining the safe carrying capacity:

$$P=\frac{2\,w.h.}{S+1}$$

in which P equals a safe carrying capacity of 15 tons; w, 120 the weight of the hammer in tons (which shall be between 2,000 and 3,500 pounds); h, the height of the fall of the hammer in feet; and S, the average penetration of the pile under the last five blows.

Four permanent piles shall be tested to 25 tons during the progress of the work, the location for such tests to be selected by the superintendent, who shall report settlements for each 5 tons loading. The settlements for the 15-ton and the 25-ton loads shall also be reported after having been allowed to stand for twenty-four hours.

All excavations shall be kept practically free from water during the placing of the concrete and until after the concrete has set.

The concrete footings or pile caps shall be composed of one volume of Portland cement, three of sand, and five of 2-inch gravel or stone aggregate, and it shall be reinforced by two thicknesses of metal fabric, as is required for reinforcing other concrete, the different layers of the fabric to be laid at right angle to each other.

The building shall be completed on or before the 1st day of November, 1912.

The bidders will state under Alternate E the amount to be deducted for extending the time of completion of the building to the 1st day of March, 1913; also the amount to be deducted if the time of completion of the building — extended to the 1st day of July, 1913.

JAMES KNOX TAYLOR,
Supervising Architect.

(59941)

121 *Proposals for the Construction Complete (Except Elevators) of the United States Post-Office and Court-House at San Juan, P. R.*

TREASURY DEPARTMENT,

Office of the Supervising Architect,

WASHINGTON, D. C., August 27, 1908.

Sealed proposals will be received at this office until 3 o'clock P. M. on the 19th day of October, 1908, and then opened, for the construction complete (except elevators) of the United States Post-

Office and Court-House at San Juan, P. R., in accordance with the drawings and specifications, copies of which may be had at the office of the custodian of site, San Juan, P. R., or at this office, at the discretion of the Supervising Architect.

JAMES KNOX TAYLOR,
Supervising Architect.

J. W. G.
J. C. P.
G.
J. E. P.
G. W. S.
H.

N. B.—Bidders are required to return drawings and specifications without marks, notes, or other mutilations thereon.

The Government frank sent to intending bidders is to be used only for the return of drawings and specifications.

The estimate for the work is approximately $252,000.

122 General contractors, who desire to submit lump-sum bids, will be furnished with one set of drawings and specifications free, and one additional set will be furnished such contractor upon the receipt of a certified check for $100, the proceeds of which will be retained until the return of the drawings and specifications in good condition to this office.

Specifications for the Construction Complete (Except Elevators) of the United States Post-Office and Court-House at San Juan, P. R.

TREASURY DEPARTMENT,

Office of the Supervising Architect.

General Conditions.

Form of proposal and signature.—Proposal must be made on the blank form hereto attached, inclosed in sealed envelope, marked proposal with title of building as given above, and addressed to the Supervising Architect, stating in writing and figures (without interlineation, alteration, or erasure) the sum of money for which the bidder proposes to sup-ly the materials and perform the work required by the drawings and this specifiaction, and the time within which he proposes to complete the work, and the unit prices called for in proposal sheet. The proposal must be signed with the full name and address of the bidder; if a copartnership, the co-

123 partnership name by a member of the firm, with the names and addresses in full of each member; and if a corporation, by an officer in the corporate name, with the corporate seal attached to such signature. No telegraphic proposals or telegraphic modifications of proposals will be considered. Proposals received after the time advertised for the opening will be returned unopened. If pro-

posal is sent by registered mail, allowance should be made for the additional time required for such transmission.

Certified check.—Each bidder must submit with his proposal a certified check, in a sum equal to 2 per cent of the amount of such proposal, drawn to the order of the Treasurer of the United States, and the proceeds of said check shall become the property of the United States, if, for any reason whatever, the bidder, after the opening of the bids, withdraws from the competition, or refuses to execute the contract and bond required in the event of said contract being awarded to him, and checks submitted by the unsuccessful bidders will be returned after the approval of the contract and bond executed by the successful bidder. Copy of contract and bond will be furnished the contractor after the ap-roval of his bond.

Eight-hour law.—The attention of bidders is called to the act of Congress approved August 1, 1892, limiting the hours of daily service of laborers and mechanics employed upon public works of the United States to eight hours in any one calendar day.

Subcontractors.—No subcontractor or other person furnishing material or labor to the contractor will be recognized, nor
124 will this Department be responsible in any way for the claims of such persons beyond taking a bond, as required by the act of Congress approved August 13, 1894, which provides in substance that when a formal contract is let for the erection or repair of a public building, etc., the contractor, before commencing such work, shall furnish the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor will make prompt payment to all persons furnishing him labor or materials used in the prosecution of the work. Persons so furnishing materials or labor have a right of action on said bond, in the name of the United States, for their use. No formal contract is usually let, however, and no bond taken where the amount involved is less than $2,000.

Parties in interest.—No Member of or Delegate to Congress and no officer of the Treasury Department, superintendent, inspector, clerk, employee, or other person in any manner connected with the office of the Supervising Architect, shall be interested, either directly or indirectly, in the contract or work herein provided for or be entitled to any benefit derived therefrom; and any violation of this understanding shall work a forfeiture of all moneys which may become due to the successful bidder.

Rights reserved.—The material proposed to be used, time for completion of work, and the competency and responsibility of bidders will receive consideration before award of contract.

The Treasury Department reserves the right to accept any part or parts of the proposal made at the prices included in same; also to waive any informalities in, and to reject any and all pro-
125 posals, and to require the contractor to discontinue the services of any workman employed on the work who is unskilled or otherwise objectionable.

Form of contract.—The contract which the bidder agrees to enter into shall be in the form adopted and in use in the office of the Supervising Architect; blank forms of which can be inspected at

said office, and will be furnished, upon request being made, to parties proposing to submit bids. In case of the abrogation of the contract, whether by reason of the default of the contractor, his bankruptcy, or other cause, the Supervising Architect, acting for both parties, shall have the right to determine the valuation of all work performed, and all material furnished in place in connection with the contract, and of all material, machinery, tools, etc., upon the site of the building taken possession of by the Government, and his decision shall be final.

Protection of work and materials.—The contractor must obtain, at his expense, all necessary policies of insurance on work and material supplied by him, as the same will be at his risk until final completion, inspection, and acceptance; but the contractor will be relieved of any risk for that portion of the building occupied by the Government before entire completion of his contract.

Modifications.—The Department reserves the right to make any addition to, omissions from, or changes in, or substitutions for, the work or material called for by the drawings and specifications, without notice to the surety or sureties on the bond given to secure satisfactory compliance with the terms of the contract; and the
126 Department further reserves the right to demand additional security when additions are made, if, in its judgment, such security is required. The unit prices called for in the proposal sheet shall be used as the basis of value of such additions, omissions, or changes, if they are deemed reasonable by the Supervising Architect. If deemed unreasonable, or if none applicable are given, and no agreement can be reachd by the Supervising Architect and the contractor as to the reasonable value of the work, then the Supervising Architect shall have the right to fix the value of such additions, omissions, or changes, and no claim for damages on account of such change or for anticipated profits shall be allowed.

Payments.—Payments will be made as hereinafter stated.

Delays.—Each bidder must submit his proposal with the distinct understanding that, in case of its acceptance, time for the completion of the work shall be considered as of the essence of the contract, and that for the cost of all extra inspection, and for all amounts paid for rents, salaries of contingent force, and other expenses entailed upon the Government by delay in completing the contract, the United States shall be entitled to the fixed sum of fifty dollars ($50) as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States. Provided, however, that the collection of said sum may, in the discretion of the Secretary, be waived in whole or in part; and that the contractor is to be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the Government.

127 The Department, acting for the United States, reserves the right to suspend any portion of the work embraced in the contract whenever, in its opinion, it would be inexpedient to carry on said work.

Executive Order.

Attention is directed to the following Executive order:

Whereas by an Act of Congress which received Executive approval on February 23, 1887, all officers or agents of the United States were, as a matter of public policy, forbidden under appropriate penalties, to hire or contract out the labor of any criminal who might thereafter be confined in any prison, jail, or other place of incarceration for the violation of any laws of the Government of the United States of America.

It is hereby ordered that all contracts which shall hereafter be entered into by officers of agents of the United States involving the employment of labor in the States composing the Union, or the Territories of the United States continguous thereto, shall, unless otherwise provided by law, contain a stipulation forbidding, in the performance of such contracts, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction.

Executive Order No. 2.

I. All Departments of the Government under the Super-
128 vision of which public works are being constructed are hereby directed to notify the representatives stationed at such public works to report at once to their respective Departments all cases in which contractors or subcontractors on works now under construction have required or permitted laborers or mechanics in their employ to work over eight hours in any one calendar day.

II. All Government representatives in charge of construction of public works are further directed that it is part of their duty to report to their respective Departments each and every case in which laborers or mechanics are required or permitted to work over eight hours a day on the works under supervision of such Government representatives. Wherever reports showing work in excess of eight hours a day are received by any department they are to be referred to the Department of Justice for appropriate action.

III. All Departments of the Government under the supervision of which public works are being constructed by contract are further directed to have their respective legal officers prepare and forward to the President a list of such statutes and Executive orders as have a direct bearing on contracts for the construction of public works, and with which bidders on such works should be made acquainted.

Notice to Sureties.

The attention of the sureties is particularly directed to the following conditions: The final inspection and acceptance of the work
shown by the drawings and specifications forming a part of
129 the contract shall not be binding or conclusive upon the United States if it shall subsequently appear that the contractor has willfully or fraudulently or through collusion with the rep-

resentatives of this Department in charge of the work supplied inferior materials or workmanship, or has departed from the terms of his contract. In any such case the United States shall have the right, notwithstanding such final acceptance and payment, to cause the work to be properly performed and satisfactory material supplied to such extent as in the opinion of the Supervising Architect may be necessary to finish the work in accordance with the drawings and specifications therefor at the cost and expense of the contractor and the sureties on his bond, and shall have the right to recover against the contractor and his sureties the cost of such work, together with such other damages as the United States may suffer because of the default of the contractor in the premises, the same as though such acceptance and final payment had not been made.

Attention is called to section 21 of the act approved June 6, 1902, which provides as follows:

That in all contracts entered into with the United States, after the date of the approval of this Act, for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is hereby authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties.

130 Guarantee.—This specification requires that certain work be guaranteed and maintained in good condition for a specified time after its final acceptance and the payment therefor, and the bond which will be required in connection with the contract must also cover such guarantee.

Proposals.—Proposals as hereinbefore called for must be based upon the drawings Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, W-36, W-37, W-38, W-39, W-40, miscellaneous drawings Nos. M-48, M-55, and this specification.

Extent and character of work.—This contract includes the construction of the building complete, including installation of the plumbing, gas piping, electric conduits and wiring. The elevators and the interior lighting fixtures are not included.

The letter boxes, paper, and package drops, etc., will be furnished by the Government, but the contractor will be required to set them in place, as hereinafter specified.

The contractor must carefully fit his work to any work which may be provided by another contractor in advance of that contemplated by this specification, and he shall not proceed with any portion of the work in connection therewith until such other work is properly in place and he is directed to do so.

Bidders should visit the site and fully inform themselves of the

131 character of the same, and the conditions under which the work is to be performed, and failure to do so will not relieve the successful bidder from the necessity of supplying, without additional cost to the Government, any materials or labor that may be required to complete the work in accordance with the true intent and meaning of the drawings and specification.

Payments.—Payments of 90 per cent of the value of the work executed and satisfactorily in place, as ascertained by the Supervising Architect, acting through the superintendent will be made monthly; and payment of the 10 per cent retained will be made after the final acceptance, by the duly authorized representative of the Treasury Department, of all materials and workmanship embraced in the contract. But payment will not be made until every part of the work to the point for which payment is claimed is satisfactorily supplied and executed in every particular and all defects therein remedied to the satisfaction of the Supervising Architect.

The Government reserves the right to withhold any payment until satisfactory engineer's certificates, samples, and shop drawings, hereinafter mentioned, are supplied in accordance with the specification requirements.

Time to Complete.—The work must be carried on with sufficient workmen and materials to the satisfaction of the Supervising Architect to insure its completion on or before the 1st day of July, 1910.

Foreman.—A satisfactory foreman or superintendent shall be kept on the ground at all times during the progress of the work to receive instructions and with authority to act for the contractor.

132 Models.—It is the purpose of the Government to supply models for certain ornamental work, but the right is reserved to require the work to be executed from full size drawings, at the discretion of the Supervising Architect.

Explanation of drawings.—The general character of the detail work is shown on the scale drawings, but minor modifications may be made in the full-size drawings or models, and the contractor must not get out any part of the work requiring details or models until he has received the same.

This specification is intended to supplement the drawings, and therefore, it will not be the province of this specification to mention any portion of the construction which the drawings are competent to explain, and such omission is not to relieve the contractor from carrying out such portion only indicated on the drawings, and should items be required by the specification not indicated on the drawings, they are to be supplied even if of such character that they could have been indicated thereon. Any items which may not be indicated on the drawings nor mentioned herein but are necessary to complete the entire work, must be supplied in place.

The decision of the Supervising Architect as to the proper interpretation of the drawings and specification shall be final.

Workmanship and materials.—All work must be executed in strict accordance with the drawings, such other details or models as

may be furnished, this specification, and the instructions of
133 the superintendent. All materials and workmanship shall be of the best quality.

Material or work that has been rejected must be promptly removed, and should the same not be done the superintendent may, forty-eight hours after serving written notice on the contractor, have the same removed, and the expense incurred will be deducted from any money due the contractor.

Protection.—The contractor must protect all materials and work, whether incorporated in the building or not, and shall furnish heat to prevent injury from dampness or cold.

The contractor shall also provide and maintain all necessary guards, lights, etc., for the protection of the public and comply with all municipal ordinances which apply to the use of sidewalks and streets for building operations, but such ordinances do not govern inside lot lines.

Temporary toilet accommodations.—The Contractor must provide for the use of his workmen, where directed, ample sanitary toilet accommodations and keep such clean and free from flies, and prior to the completion of the contract all connections and appliances connected therewith are to be removed and the premises left perfectly clean.

Debris.—When directed and at the completion of the work, the contractor must remove all dirt and rubbish from the building, site, and adjacent streets.

Surveys and test levels.—The contractor must employ a competent engineer to lay out the lines of the building, establish the elevations at tops of footings and piles, the different floor levels, the top of main walls, and the lines and elevations of the
134 approaches, and forward to this office, through the superintendent, certificates of said engineer that finished levels are as required by the drawings.

Photographs.—The contractor must furnish to the Supervising Architect photographs as follows: On the first of each month two photographs 6½ by 8½ inches mounted on muslin and each month during the erection of the steel work two additional photographs, all from points selected by the superintendent, and when the building and approaches are completed, unmounted photographs 8 by 10 inches, in duplicate, from two points of view, one showing the entire front and one side elevation and the other the entire rear and remaining side. The photograph of the finished work shall be from such points as will give the best general view of the building and must include as much of the approach work as is consistent therewith.

Shop drawings.—Shop drawings, course and setting plans, as hereinafter specified, must be furnished to and be approved by the Supervising Architect before any of the work for which such drawings are required is commenced, and all work furnished must be in strict accordance with such approved drawings. The approval of such drawings shall be general, and does not mean said drawings have been checked, and shall in no way relieve the contract- from

the responsibility of proper fitting and construction of the work, nor from the necessity of furnishing material or workmanship required by the drawings and specifications which may not be
135 indicated on shop drawings when approved. Each shipment of drawings must be accompanied by a letter of transmission giving a list of the numbers of the drawings. Each drawing must be marked with the name of the building, each series to be numbered consecutively, and all drawings must be checked and be complete before being forwarded to this office.

Samples.

Here follows description of samples immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Excavation.

Here follows description of excavation immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Cement.

Here follows description of cement immaterial to the issue in this cause and therefore omitted by the request of counsel.

Mortar and Concrete.

Here follows description of mortar and concrete immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Stone work.

Here follows description of stonework immaterial to the
136 issue in this cause, and therefore omitted by the request of counsel.

Brickwork.

Here follows description of brickwork immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Steel and Iron Work, etc.

Here follows description of steel and iron work, etc., immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Roofing and Sheet Metal Work.

Here follows description of roofing and sheet metal work immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Plastering.

Here follows description of plastering immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Marble-work.

Here follows description of marble-work immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Woodwork.

Here follows description of woodwork immaterial to the
137 issue in this cause, and therefore omitted by the request of counsel.

Hardware.

Here follows description of hardware immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Painting and Varnishing.

Here follows description of painting and varnishing immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Glazing.

Here follows description of glazing immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Mechanical Equipment.

Here follows description of mechanical equipment immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Plumbing.

Here follows description of plumbing immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Alternate Bid for Structural Sanitary Glass.

Here follows description of alternate bid for structural
138 sanitary glass immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Gas Piping.

Here follows description of gas piping immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Conduit and Wiring System.

Here follows description of conduit and wiring system immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Wiring.

Here follows description of wiring immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Approaches.

Here follows description of approaches immaterial to the issue in this cause, and therefore omitted by the request of counsel.

Alternate Construction.

Here follows description of alternate construction immaterial to the issue in this cause, and therefore omitted by the request of counsel.

JAMES KNOX TAYLOR,
Supervising Architect.

139 The P. J. Carlin Construction Company has been performing large contracts for about fifty years, approximating about Forty Million Dollars worth of contracts in that time. Among other large works we had the contract for the work at the U. S. Naval Academy at Annapolis, Md., involving about Two Million Dollars; seventeen power houses for the New York Edison Company; the Brooklyn Institute of Arts and Sciences, and about six to ten million dollars worth of work for the City of New York.

The contract in question was originally entered into between our Company and Mr. Guerini personally. It covered the concrete work from the basement floor level up to and including the roof. We put in the foundations and they put in the concrete from the top of the foundation level. Above the basement floor they were to put in concrete in the form of imitation sandstone, which is considered the highest type of concrete, requiring the use of moulds and forms. Mr. Guerini was the original Guerini Stone Company, but he assigned the contract to a corporation organized under the laws of Massachusetts.

When I sent the telegram dated January 10th, "Send bond for Porto Rico. Work must start at once" I knew that there was considerable work that the Guerini Stone Company had to do in the way of making moulds, some preliminary working drawings, or shop drawings. In order for them to put into the building the work under the contract it was necessary for us first to settle with the authorities at Washington as to the detail drawings which they had to make under the contract. The object of stating that the work must start at once was that it was necessary for us to start
140 our work in order to complete the work on time, and it was also necessary for Mr. Guerini to start his preliminary work on drawings. I did not order any member of the Guerini Stone Company to come to Porto Rico at that time. It would have been very much easier to have made these detail drawings much closer to Washington than Porto Rico. The effect of the Guerini Stone Company's coming to Porto Rico so soon had no bearing on the matter of expediting the work at that time, because they could not do any work on this building until our work had advanced up to the basement floor, and it would delay their work on detail drawings.

There was also a question taken up between the Guerini Stone Company and the authorities in Washington with regard to the

method of joining one day's work with another when it came to the imitation sand stone above the granite. They could do no work on the imitation sand stone until this question was settled. The question was not settled until some time in July or August. Up to July 10th, 1911, we had not exercised our option to have the Guerini Stone Company set the granite in place, and up to this time, they had no intimation that they were to get this contract. Thereupon, counsel for defendant asked the witness the following question.

Q. "After the P. J. Carlin Construction Company entered upon the performance of its contract with the Federal Government for the construction of this building, were any changes made in the construction of the foundation? and if so, by whose authority or order, and to what extent? To this question, counsel for plaintiff objected on the ground that it was immaterial, in that the relations between plaintiff and defendant were governed by the sub-
141 contract between the parties, and that no change by mutual agreement between the Government and the P. J. Carlin Construction Company could alter the obligations of the Guerini Stone Company under the contract without its consent. This objection was over-ruled by the Court, and an exception duly noted by the plaintiff.

A. Changes were made in the contract, and with particular reference to the foundation. The original information regarding the character of the soil at the site of the building was furnished by individuals under contract with the Government for this purpose, with whom we had no connection. The original plans were based on these borings. At this point, counsel for plaintiff asked whether or not the witness's testimony on this point was not hearsay, and the witness testified that his information was obtained from a Government official. Thereupon, counsel for plaintiff objected to the admission of witness's testimony in this regard as hearsay, and the objection having been over-ruled, an exception was duly noted by the plaintiff. A. During the process of construction from January until May 1911 certain variations were made from time to time from the plans and specifications in accordance with communications received from Washington directed to Mr. Stierle who was superintendent of construction here.

Thereupon, witness was asked the following question by counsel for defendant:

Q. What was the condition of affairs here in San Juan with respect to the ability of the Carlin Company to proceed with the foundation work at that time? And the following transpired:

Mr. PETTINGILL: Was he in New York?

Mr. DEXTER: Yes.

142 The COURT: He is the president of the Company.

Mr. DEXTER: I contend that it is relevant because it is a report of a competent officer on the building to the President.

The COURT: Is the person making the report present?

The WITNESS: It is signed by F. T. Carlin who was the local agent here.

The COURT:

Q. Is he here now?
A. He is not here now, he is in New York.

The COURT:

Q. Was that report received by you?
A. Yes Sir.

THE COURT:

Q. In the due course of your business?
A. Yes Sir.

The COURT:

Q. On your letter head?
A. Yes Sir.
The COURT: Do you recognize the signature?
A. Yes Sir.

Thereupon, the plaintiff's exception was over-ruled and an exception duly noted.

The WITNESS: Changes were wade in the foundations with respect to thickness, width and heighth, and also in the reinforcement to be used.

On March 9th we received a telegram from the Department of War stating that they had been notified from Porto Rico that radical changes had been made in the foundations, that an investigation was being made, and that until a report was had from the investigation, no more work was to go forward at San Juan. As a result of negotiations with the authorities in Washington it was agreed that changes should be made in the foundations in order to obviate
143 the difficulties which had arisen, and that responsibility for these difficulties should be determined later. The Government agreed to pay us a certain additional sum for doing the work of changing the foundations.

It was discovered that there was a layer of soft mud, or manglares, underneath a portion of the sub-soil, which did not appear in the original boring. The P. J. Carlin Construction Company has nothing to do with the original boring. Accordingly, the type of foundation was again changed, and the Government made plans and specifications carried to rock at every point by the use of concrete on the North half, and the balance on the South half.

Thereupon, defendant introduced without objection the letter addressed to it by Mr. E. E. Heald, dated San Juan, March 25th 1912, same being admitted and marked Exhibit 41 for the defendant.

EXHIBIT 41 FOR DEFENDANT, #891.

Office of Superintendent of Construction.
Treasury Department.
Field Force.

Office of Supervising Architect.

P. J. Carlin Construction Company, %San Juan Office.

San Juan, P. R.
Received Mar. 25 1912.
Copy at San Juan March 27, 1912.
P. J. Carlin Const. Co.
Per answered by P. J. C. March 25.

SAN JUAN, P. R., March 25, 1912.

144 GENTLEMEN: Referring to the matter of the footings of the new Post Office Building, this City, you are informed that the recent investigation by Superintendent Berryman and myself has shown that practically the entire building must be underpinned in order to secure safe foundation. I have communicated this fact to the Department at Washington; and am in receipt, under date of 23rd inst., of a cablegram directing me to prepare drawings and specifications for the necessary work, and to obtain a proposal from you therefor, with the distinct understanding that acceptance is subject to subsequent settlement of responsibility for the departures from the contract drawings on account of which the underpinning is necessary.

As additional work will be necessary in connection with the footings of the main walls and loggia walls of the north and east sides, and in order that the work may be expedited with the force now at hand, the Superintendent will interpose no objection to your commencing excavation adjacent to the above mentioned walls. This excavation will be subject to the conditions regarding acceptance of your proposal as above stated, and must not in any case be carried below the bottom of the footings, pending action upon your proposal by the Department at Washington.

The drawings and specification for the repaid work will be handed to you at the earliest possible date for estimate.

Please acknowledge receipt of this letter, stating whether the procedure above outlined, in regard to proposal, is satisfactory to you, pending reference of the whole matter to the Department for settlement.

145 Respectfully,
(Signed) E. C. HEALD,
Structural Engineer.

San Juan, P. R.
Received Mar. 25 1912.
P. J. Carlin Const. Co.
Per Answered March 25 by J. P. C.
Copy at San Juan March 27.

When the piling as called for in the original specifications was omitted, a spread footing type of foundation was found necessary to take its place. The usual proceeding is for the Government to make a plan showing the changes, but when the piles were omitted, no plans were ever made by the Government to indicate how a new type of foundation should be put in, but the Government indicated to Mr. Stierle, the then Federal Inspector, that he was to use his own judgment. Mr. Stierle made the daily changes which became necessary to place a type of foundation to replace the piles, and in so placing the foundations under Mr. Stierle's instructions, there were variations from the original plans and specifications. These plans were entirely set aside and new plans and specifications made necessary later when the information was obtained as to the condition of the sub-soil. We made a proposal to the Government to do the work necessitated by this last change in the foundations, and an arrangement was finally arriyed at whereby the Government paid us a certain sum of money not to exceed $40,000.00 for this work, the Government reserving the right to fix the responsibility for
146 the failure of the foundations later. The foundations were completed up to the basement level ready for the structure above that about the 25th or 28th of July, 1911. This delay was caused because of the change which was made from the original plans and specifications which called for a pile foundation in the lower half of the building, which was subsequently changed by the Government in May 1911 to spread footing foundations and the piles were omitted and we made a request for their omission at that time. The desire to omit these piles was first made known about January 25th to January 28th, 1911, and the actual order for their omission was not received until about May 13th, 1911. This delayed the execution of the work. I should say that the actual work of beginning these foundations was started in February and completed in July, and I should judge with Mr. Converse that it should not take more than three or four months to put in all of these foundations, but it did take six.

Thereupon, Counsel for the defendant asked the following question;

Q. With your knowledge of the contract and the specifications, and what you were required to do under them, I will ask you to state if you failed during the time I have indicated, to provide any labor and materials not included in the sub-contract? Whereupon, the witness asked the Court the following question:

Q. Of my own knowledge? Do you include letters which I received from Porto Rico informing me of conditions here, because I was not here all the time?

By the COURT: They were addressed to the P. J. Carlin Construction Company of which you were President?

147 A. Yes Sir.

By the COURT: And you had knowledge of them?

A. I did.

The question above quoted was then put to the witness, and counsel for plaintiff objected on the ground that the witness could not reply to it of his own knowledge, and the objection was over-ruled, and an exception noted by counsel for plaintiff.

To said question the witness answered:

The P. J. Carlin Construction Company has never failed to furnish labor and materials for this contract.

Thereupon, counsel for defendant asked the following question?

Q. I will ask you to state if in the corresponding time the Guerini Stone Company has delayed furnishing any material or performed any work as called for by them under their sub-contract?

Counsel for plaintiff objected on the ground that the witness could not testify of his own knowledge, and the objection was over-ruled and an exception noted by counsel for plaintiff, and the witness answered that the Guerini Stone Company had caused delay by failure to furnish labor and materials. The first cause of delay on their part was failure to build the concrete walls ready for the granite construction. The second failure was to place the granite itself after it had arrived. They did not supply a sufficiency of labor to do that work. Another cause of delay on their part was the small matter that we referred to with respect to the placing of the reinforcing bars between February and March of 1912.

148 The usual form of making payments, and as was provided in the contract between us and the Government, is to stipulate in the original proposal what unit prices we would charge for deductions or omissions for particular kinds of work mentioned in the proposal. This is afterwards copied in the payment sheet for the making of payments to the contractor. In our original proposal to the Government for this work, and, in accordance with the proposal sheet demanding such information it was stipulated that for concrete footings * * *

At this point, counsel for plaintiff objected on the ground that the witness was going into his contract with the Government and into the preliminary proposal when the proposal had not been introduced in evidence and had not become a part of the contract between the Government and the P. J. Carlin Construction Company, and that in any event, the contract between the Government and the P. J. Carlin Construction Company was not binding on the plaintiff, except in so far as particularly incorporated in the sub-contract between plaintiff and defendant. The objection was over-ruled, and an exception noted by counsel for plaintiff.

A. Our contract with the Government mentioned the unit items for concrete in the footings and in the concrete walls of thirty five and fifty cents a cubic foot. There was no other unit to be applied for concrete work that the Guerini Stone Company was to do under their contract except the units mentioned. These units applied to concrete work in the footings and walls. There was no unit for imitation sandstone either between us and the Government or between us and the Guerini Stone Company.

149 In the sub-contract with the Guerini Stone Company it states in Art. 25 that the sub-contractor agrees to build the concrete footings complete to the basement floor for the sum of $6.70 a cubic yard, which is approximately twenty-five cents a cubic foot. Up to the time that the Guerini Stone Company abandoned this contract no occasion had arisen for the application of any other unit except that one for the concrete work. The larger unit represented the value of the imitation sandstone for $1.07, and this had been paid to the Carlin Construction Company by the Government, because when the Carlin Construction Company made its arrangements for the payments under the contract it was agreed with Mr. Stierle, who was the Government Superintendent in consultation with the Carlins on a unit schedule of prices which would prevail throughout the entire contract; that is, the various parts of the work were separated into about twenty items, and a total given to each item, and there were units applied to each separate item, and accordingly, under this schedule, the Carlin Construction Company received $1.07 for the concrete work in the foundations. Mr. Berryman who took Mr. Stierle's place changed the basis of payment, and his payments were thereafter based on thirty-five cents a cubic foot for this class of concrete work. Accordingly, we were overpaid about $8,500.00, and it has been agreed with Mr. Berryman that this would be deducted from our next payment. Our contract unit for this work with the Guerini Stone Company is $6.70 a cubic yard and twenty five cents a cubic foot, but I am allowing them a greater quantity than they have claimed based on their estimate of quantities,
150 and applying the unit of forty cents which appears in our sub-contract with the plaintiff to the total amount of feet of granite set, or 3,547 square feet at forty cents gives One Thousand Four Hundred and Twenty Eight Dollars and Eighty Cents total. From this I deduct $357.40 for cleaning and pointing because this is usual and customary and this leaves a balance for granite setting of $1,074.10. The total amount of all the concrete that the plaintiff was to do up to the beginning of the artificial stone work I will call 23,124 cubic feet, which at the unit price of $1.07 a cubic yard gives us $5,796.00. Deducting for surfacing the amount of $1,159.20 leaves a balance of $4,436.80. Now deduct 15%, or $856.64, as they are only entitled to 85% payments gives a total balance of $4,854.26 There were charges against the Guerini Stone Company for supplies and the use of the derrick engineer and labor of $2,469.88.

The major part of this deduction is for the concrete work done in the area and in the approach work which they refused to do, and which we did. There was cash paid to the Guerini Stone Company in the sum of $4,439.55. On the basis of this calculation, the Guerini Stone Company has been already over-paid $2,064.43, but independent of these charges the amount to their credit would be approximately $400.00 after deducting our fifteen per cent. This has not been paid to the Guerini Stone Company because they abandoned their Contract, which gave us the right to retain any balance which was due to them. The alleged agreement as to units testified

to by Mr. Converse, and now introduced as Exhibit 20 by
151 the Plaintiff was not a contract or agreement between us. Mr. Converse came to our office and asked the basis for payments that we were using with the Government. It is required by the Government that this schedule of unit prices shall be publicly posted so that any sub-contractor shall have access to it and know what the general contractor is getting for his work. This was about February 10th. He asked me for a copy of that schedule. I asked Mr. Lovering who is here in Court, and was our bookkeeper in New York, to get that for me, and he brought it into my private office, and Mr. Converse asked if he could have a copy of it, and I said: "You can" I said: Mr. Lovering will make a copy for you. Mr. Lovering took off the first four items, because I presume, the other items did not interest Mr. Converse as they had nothing to do with his contract. The first of these four items was for excavating and filling of which the Guerini Stone Company did none; the second was for the concrete footings and walls to the basement level, and the units are fifty and thirty-five cents per cubic foot, which is the same work for which the Guerini Stone Company claimed that they should have a unit of $1.07. Third: exterior and interior concrete walls, arches and cement work $1.07 a cubic foot. There has been interior concrete work done by the Guerini Stone Company, but if you will permit me I wish to make an explanation of the apparent discrepancy of these items with respect to the Government units. The fourth item, concrete floors and casings, unit 45½ cents per square foot. The schedule states that the concrete foundations and walls to the basement level shall be paid for at the rate of 35 cents
152 and 50 cents a cubic foot. Item three says exterior and interior concrete walls, arches and cement work, but they don't specify where it is to start, that is, whether it is above or below the basement, that is where the difficulty presented itself to Mr. Stierle undoubtedly at that time.

Cross-examination by COUNSEL for PLAINTIFF.

The unit of $6.70 a cubic yard in the 25th paragraph of the contract between defendant and plaintiff covers work which as a matter of fact was not done by the plaintiff, but the character of the work which they did was exactly similar, which was the continuation of the basement wall. They did not do any work below the basement floor. There is no unit mentioned in the contract between the Guerini Stone Company and the Carlin Construction Company for concrete work than the unit of $6.70 which did not apply to any work actually done by them. We did not exercise our option to have them build the sidewalks. The first change in the foundations was suggested before work was begun when I first came down here and met Mr. Stierle a day or two before Christmas 1910. I stayed here about ten days and then went back to New York, and it was after my arrival there that I sent the telegram to the Guerini Stone Company which has been introduced in evidence. I did not visit Porto Rico again until March, 1912, more that a year later. I was not in Porto Rico between January, 1911, and March, 1912. I did

not communicate to the Guerini Stone Company the information which I received in January, 1911, as to the likelihood that the foundations would be changed. From January, 1911, to
153 March, 1912, the information to which I have testified regarding what took place in Porto Rico on the building is all derived from reports made to me in New York by Superintendents on the work. The question of joining referred to, *and* solely affected the artificial sandstone above the first story on top of the granite, none of which has yet been done, and therefore caused no delay.

Referring to item No. 2 on the schedule of unit prices calling for fifty and thirty-five cents that applies to concrete footings and walls to basement level, which covers the work which was done by the P. J. Carlin Construction Company and not any work done by the Guerini Stone Company.

Thereafter, further to prove the issues on its part the defendant called and produced the witness JOSEPH P. CARLIN, who after being duly sworn testified as follows:

Direct examination by Mr. DEXTER:

Taking the units allowed by Mr. Berryman after he assumed position of Inspector and applying it to the figures which I have given as to the amounts of work done by the Guerini Stone Company, and using this as a basis of calculation for what we should have paid them, it results that they were actually underpaid only about $400.00. In addition to this we have charges against them in the sum of $2,469.88, the nature of these charges being that they would accrue against the work subsequently, that is, the charges for cleaning, finishing and pointing. I base our counterclaim in the sum of $40,000.00 against the Guerini Stone Company on the estimated damage to the P. J. Carlin Construction Company by reason of the Guerini Stone Company's abandoning the contract, and making it necessary for us to do this work, or to sub-let it to some other contractor. I arrived at the amount by submitting it for bids
154 by local men, and getting one from a man who was here at the time.

Cross-examination by Mr. PAINE:

We were actually paid by the Government on account of work done by the Guerini Stone Company about $19,000.00. We actually paid the Guerini Stone Company about $4,500, and we now figure that the Guerini Stone Company is indebted to us.

In February and March, that being the period when the Guerini Stone Company was demanding payments, the charges for cleaning and pointing were not proper charges to be made against the Guerini Stone Company at that time.

Thereupon, further to maintain the issues upon its part, defendant called and produced FREDERICK O. LEWIS, who after being duly sworn testified as follows:

Direct examination by Mr. DEXTER:

My name is Frederick O. Lewis, I am an architect, and engineer for Purdy & Henderson, having had experience during all of my life in building construction. I made a bid covering completing the work to be done by the Guerini Stone Company on the Federal Building, and I have a copy of this bid here. This bid was not accepted by the P. J. Carlin Construction Company, and we entered into no contract. PP.

The bid was then offered in evidence and objected to by counsel for plaintiff on the ground that inasmuch as it never had been accepted by the P. J. Carlin Construction Company it was not relevant to prove the cost to the P. J. Carlin Construction Company of doing the work, nor admissible as evidence to show the damages suffered by the P. J. Carlin Construction Company by reason of the ter-
155 mination of the contract by the Guerini Stone Company.

The objection was overruled an- exception noted by counsel for plaintiff.

The witness then read in full the document, which showed the total amount of the bid to be $104,250.00.

Thereupon, further to maintain the issues upon its part, defendant called and produced A. STIERLE, who after being duly sworn, testified as follows:

Direct examination by Mr. DEXTER:

My name is A. Stierle. I am a civil engineer of the United States Engineering Department. In January 1911 I was Superintendent of Construction for the United States in charge of the Federal Building under construction here. I had recommended to the Department to leave out part of the piles which were included in the original specifications.

Under date of May 17th, 1911, I was shown a cable from the Department to the Carlin Construction Company reading:

"Your proposal May 13th accepted to deduct $5,478.00 your contract San Juan Post Office for omission piling."

That cable to the contractor was the first notice that I received that they had omitted the piles.

At the same time, Mr. Tayler cabled me:

"Department has accepted Carlin Company's proposal to omit all piles or pier footings carried to depths required and forward drawings showing work as actually installed."

I took that as authority to me to go as far as I saw fit to make drawings of any change that was necessary.

By letter dated May 17th, 1911, the Department wrote me:

"Upon receipt of the drawing showing work as installed, this office will be in position to take up the question of settlement with the contractors."

I ceased to act as Superintendent of the Federal Building
156 on February 1st, 1912. With regard to the schedule of prices which was used by me in making the payments to the Carlin Construction Company, covering work as it was performed by them, that was fixed upon the orders of the Supervising Architect by Mr. Carlin and myself dividing the whole work into a certain number of items, and giving each item a certain unit price. I prepared the list and sent it to Mr. Carlin to be amended or changed, or signed if it was satisfactory to him, and forwarded it to Mr. Taylor. As to these prices, I had to have units, and I could not get quantities except by reference to the contract. They were not all given in the contract so I had to get the quantities the best I could by guessing. I came pretty close in some of the cases too, but I had to get the information about the work with particular reference to concrete work, and I took Carlin's figures and he knew his prices that he was going to get for it, that was where the $1.07 came in. Mr. Berryman insists that because it was a certain class of concrete it was only worth thirty five cents a cubic foot. I looked at the Dollars and cents for which I had strict instructions from the Supervising Architect to be careful and not to exceed the appropriation, I could put the money where I pleased, but I must not exceed the appropriation, so I divided these items according to what I knew the things would be worth, and of course, Mr. Carlin amended them here and there, and the Supervising Architect approved the list and gave me orders to stick it up in the office where they could all see it. That is why I put in that $1.07. In the end it would come out all right. I lumped the whole concrete at $1.07.

157 Cross-examination by Mr. PAINE:

I do not think any modifications were made in the specifications for the foundations before May 17th.

Thereupon, defendant offered in evidence the following exhibits numbers 3 to 68 inclusive. To the introduction of exhibits numbers 3, 21, 22, 49, 50, 51, 65, and 66 the plaintiff duly objected on the same grounds and on the ground that the evidence was immaterial, not binding on the plaintiff, and that the relations rights and obligations between the plaintiff and the defendant were covered solely by the terms of the sub-contract between them. These objections were separately over-ruled by the Court, and the plaintiff duly noted an exception to each separate ruling.

To the introduction of Exhibit 67 the plaintiff duly objected on the same grounds, on the ground that the evidence was incompetent, and immaterial, not binding on the plaintiff, that it did not appear from what data the figures were made up, and that the witness had apparently simply reduced his testimony to writing within a few days before the trial and sought to introduce the writing to substantiate the testimony given by him orally. The Court over-ruled the objections and an exception was duly noted.

EXHIBIT No. 3 FOR DEF'T 891.

Copy.

MIDDLEBORO, MASS., February 1, 1911.

158 Mr. James Knox Taylor, U. S. Treasury Dept., Washington, D. C.

DEAR SIR: Enclosed you will find specifications for making the imitation granite and the imitation sand stone per request of your chief constructing engineer, Mr. Simonds. By express you may have received sample of the same.

The points of advantage of the imitation granite over the real granite are:

1. The imitation granite is but little affected by fire; this was fully demonstrated a few years ago at the Chelsea, Mass., conflagration. A few months before this great catastrophe, I furnished for the Chelsea armory the imitation granite for the exterior steps and buttresses, after the fire it was observed that the real granite in other buildings was so utterly damaged by the fire as to be entirely worthless, but to the steps and buttresses which I had made the only damage was the stains from the fire which were soon renewed by bush-hammering anew. There were no air checks or other imperfections ordinarily observed on cement work.

2. The imitation granite can be cast in monolithic construction and by proper reinforcement the construction can be rendered earthquake proof.

By using artificial granite, delay is avoided, which in general happens in a construction where the granite is prepared in the quarry and shipped to the construction, for instance, and this often occurs, an error in the dimension of one stone, a mistake of this
159 kind is enough to tie up all building until a new stone is shipped.

5. The cost of artificial granite is far cheaper than the real granite.

Respectfully yours,
(Signed) GUERINI STONE COMPANY.
A. GUERINI, *V. P.*

EXHIBIT No. 4 FOR DEF'T 891.

Copy.

February 24, 1911.

The Guerini Stone Co., 88 Broad Street, Boston, Mass.

GENTLEMEN: We are in receipt of the following letter from Mr. James Knox Taylor, with reference to the Post Office at Porto Rico:

"GENTLEMEN: Receipt is acknowledged of your letter of the 20th inst. forwarding copies in quadruplicate of your drawings No. 4 and 5, the same being sectional elevations through loggia of the U. S.

Post Office and Court House for which you have the contract at San Juan, Porto Rico.

It is not understood why these drawings have been submitted inasmuch as they show mainly the figured openings in the building, all of which information is given on the contract drawings. The drawings in question will be held pending receipt of full advice from you as to the action you desire taken thereon."

Kindly let us know immediately upon receipt of this letter, why these drawings were submitted, and oblige,

160 Yours very truly,

(Signed) P. J. CARLIN CONSTRUCTION CO.

J. P. C./K. M. Z.

EXHIBIT No. 5 FOR DEF'T 891.

Copy.

Guerini Stone Company.

SAN JUAN OFFICE, March 24, 1911.

P. J. Carlin Construction Co., 16 E. 23rd Street, New York, N. Y.

GENTLEMEN: In regard to the new federal building at San Juan, P. R. the columns and pilasters of the front entrance are shown on drawing No. 12 as plain but on full size drawing No. 503 are shown fluted. As this fluting is an extra to our contract will you please send us a written order for same.

The full size drawings just received show the part of the work which is to be cast and then set in position and also the work which is to be cast in position, the latter consisting of all piers front and back, arches for windows, the central part of the rear elevation and the walls of the loggia. This work also is shown on the $\frac{3}{4}$" scale drawings as to be cast in position. We understand that the

161 work which is to be cast in position is to have the same kind of finished surface as the portion to be cast and afterwards set. In doing this we have a difficulty impossible to avoid, namely showing the junction line between today's work and that of yesterday. For this reason in making the settling plans we have shown the joints the same as for the cut stone. But Mr. Taylor preferred to eliminate the joints in the work which is cast in position. We can avoid these joints by following the explanation on drawing 13, that is to plaster the surface after it is in place. But as the specifications near the bottom of page 9 definitely prohibit this method of obtaining a finished surface we ask which directions we are to follow.

Yours truly,

(Signed) GUERINI STONE CO.,
By A. GUERINI, *V. P.*

EXHIBIT No. 6 FOR DEF'T 891.

Copy.

BOSTON, MASS., June 8, 1911.

P. J. Carlin Construction Co., New York City, N. Y.

Ref. San Juan Federal Building.

GENTLEMEN: We have not yet been advised regarding the question of putting a joint into the face of the exterior concrete. Our San Juan office took this matter up with you a couple of
162 months ago, with the statement that outside plastering was not permitted by specification, and as each day's pouring would show a color mark at the junction with the next day's pouring, we did not see how the work could be done otherwise than to joint the work.

As this is one of the very first questions which must be settled before we begin our work, we request that the matter be immediately pressed to decision, so that we may know what will be satisfactory to the Department at Washington.

Will you not kindly advise us in this matter.

Yours truly,

(Signed) GUERINI STONE CO.,
H. P. CONVERSE, *Pres.*

H. P. C./S.

EXHIBIT No. 7 FOR DEF'T 891.

Copy.

BOSTON, MASS., April 27, 1911.

J. J. Carlin Construction Co., 16 E. 23rd Street, New York City, N. Y.

GENTLEMEN: We are sending you under separate cover duplicate copies of revised sheets 6 and 7 along with the corrected sheets returned by you to us of our Job No. 2397, these being concrete plans of the Post Office and Court House, San Juan, Porto Rico.
163 Yours truly,

GUERINI STONE COMPANY

S. J. G./S.

EXHIBIT No. 8 FOR DEF'T 891.

Copy.

May 4, 1911.

The Guerini Stone Co., 88 Broad Street, Boston, Mass.

GENTLEMEN: We are in receipt of the following communication from the Supervision Architect, with reference to the San Juan, P. R. Post Office:

"GENTLEMEN: Receipt is acknowledged of your letter of the 28th ulto., with corrected prints of drawings submitted the 14th ulto., in connection with your contract for the construction of the Post Office Building at San Juan, Porto Rico.

In reply, you are advised that the drawings have been given office Nos. 46 and 47, and one set is returned under separate cover.

A copy of this letter and a similar set of these prints have this day been forwarded to the Superintendent of Construction for his information and guidance in the prosecution of the work."

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.

J. P. C./K. M. Z.

Enclosure.

164 EXHIBIT No. 9 FOR DEF'T 891.

Copy.

June 16, 1911.

The Guerini Stone Co., 88 Broad Street, Boston, Mass.

GENTLEMEN: Replying to yours of the 8th inst., we beg to quote the following letter received from the Supervising Architect, with reference to the Post Office Building at San Juan:

"GENTLEMEN: This office acknowledges receipt of your letter of the 10th instant in connection with the Post Office building at San Juan, Porto Rico, for which you have the contract.

Your statement that you referred to this office some months ago the matter of the treatment for the exterior concrete work and that you would like a decision as soon as possible is not understood. The matter in question was taken up by you in your letter of March 31st and was answered by office letter of April 5th, and if you will refer to that letter it is believed that you will find the position of this office accurately defined."

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.

J. P. C./K. M. Z.

P. S.—We enclose copy of the Supervising Architect's letter of April 5th.

165 EXHIBIT No. 10 FOR DEF'T. 891.

Copy.

June 20, 1911.

The Guerini Stone Co., 88 Broad Street, Boston, Mass.

GENTLEMEN: Regarding your letter of yesterday in the matter of the Post Office building at San Juan, Porto Rico, cast concrete work, it seems that the Government requires a sample of the finish you

expect to get in pouring successive days' work, and how you intend to get this finish, and until that sample is forwarded to Washington with a description of the method to be used, the Government naturally cannot pass upon it. The Government states emphatically however that plastering on the surface will not be permitted, although it is stated to the contrary on the Full Size drawings.

The writer expects to be in Washington next week, and if you want any further information, please let me know if you will be ready to go to Washington on a telegram sent the night before.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.,
—— ——, *Secretary.*

J. P. C./K. M. Z.

166 EXHIBIT No. 11 FOR DEF'T, 891.

Copy.

Guerini Stone Company.

SAN JUAN OFFICE, June 21, 1911.

P. J. Carlin Construction Co., New York City.

GENTLEMEN: We would again call to your attention the matter of making the exterior surface of the new P. O. and Court House Building at San Juan, P. R. to show joints or to be plain without joints. We understand from your letter of April 7th that plastering the surface is not to be allowed but the other point has not been settled. As we wrote you in our letter of March 24th it is hardly possible to make the surface in place without joints and not show the line between the day's work and the next.

In regard to anchors, we cannot give you the exact number required 'till the above question is settled. In the meantime, however, we need ten to twelve hundred 12" long, bent like sketch.

1" x ¼" flat steel.

(Here appears sketch.)

Yours truly,

GUERINI STONE COMPANY.

167 EXHIBIT No. 12 FOR DEF'T, 891.

Copy.

July 10, 1911.

The Guerini Stone Co., San Juan, Porto Rico.

GENTLEMEN: Regarding the work to be done at San Juan, P. R., please let us have your price to set all the steel work, and also the ornamental work at San Juan, Porto Rico. We could state that there are about three hundred and seventy-five (375) tons of structural steel, and the ornamental iron work consists of the following:

First Shipment:

Anchors.
Curb for mailing platforms.
Window guards in basement.
Gates in basement.
44 Balcony Railings, 2nd floor.
Front Fascias, 2nd floor.
All Corridor Grilles.

Second Shipment

Stairs, 3rd floor to attic.
Framing for Main Stairs, 2 flights.
Saddles for Basement.
Window Guards, 1st floor.
Cast Jambs, Trim, Grilles, etc., for Interior Doors and Windows.

Third Shipment:

Ladders.
Pipe Railings, Basement and Attic.
Area Gratings.
Wire screens for attic and lookouts.
Railing for main stairs, 2 flights.
Gates, 1st floor, east and west entrances.
Entrance doors, 1st floor, Commerce Street & Racinto Sud.
Elevator Fronts.
10 Balcony railings, 2nd floor.
Lamp Standards.
168 Bracket Lamps.
Office and Corridor Doors, including cast trim and saddles.
Cast trim and grilles for Postoffice Bays, 1st floor.
Directory and Bulletin Boards, 1st floor.
Cast trim, grilles, wire screens, etc. for Money Order Registry Division and Workrooms, 1st floor and basement.

If possible, let us have a lump sum for both these items, and if satisfactory we may close with you direct for the setting of the steel and ornamental iron, and also for the setting of the granite and the building of the sidewalks, etc. In order that there may be no delay in negotiations, please give the matter your careful and immediate consideration, and let us have your rock bottom price at once.

Please also give us a price on making about one hundred and fifty to one hundred and seventy-five thousand cement brick, similar to the sand lime brick. We can send a machine to make from one thousand to twelve hundred brick per day. Please give us a price for making these, and another price for laying them, for facing the walls, as called for in the plans and specifications.

We are also shipping about one hundred and eighty thousand English size semi-glazed brick, which are to line the interior walls from the floor to the seven foot mark. Please give us a price on laying these brick, as soon as possible, and oblige.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.

J. P. C./K. M. Z.

169 EXHIBIT NO. 13 FOR DEF'T 891.

Copy.

July 10, 1911.

The Guerini Stone Co., San Juan, P. R.

GENTLEMEN: Regarding the work at San Juan, and with special reference to the jointing of the imitation stone work during the successive days' work' can you not take this matter up with Mr. Stierle, and get a decision from him, especially in view of his superior knowledge of the action of the setting of cement in the tropical regions.

I understand you did some work at the Colonial Bank, and from what was done there, you ought to be able to come to some satisfactory conclusion as to how the jointing should be done on the Federal Building. Please take it up with him, and let me know whether or not he will make a decision.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.,
—— ——, *Secretary.*

J. P. C./K. M. Z.

170 EXHIBIT NO. 14 FOR DEF'T 891.

Copy.

SAN JUAN, P. R., July 28, 1911.

P. J. Carlin Construction Co.

GENTLEMEN: After I have made several samples, showing the walls of the Federal bldg., *ow* they will look if the wools are moulded without joints. Mr. Stierly wrote to Mr. Taylor upholding my theory, *to* -s letter he enclosed a sketch I had made which I am not able to send to you a copy because at present I have not blue print paper. I hope we will soon -ear about this matter from Washington, and have the things go smoothly as possible.

Respectfully yours,

(Signed) GUERINI STONE CO.,
A. GUERINI, *V. P.*

171 EXHIBIT NO. 15 FOR DEF'T, 891.

Copy.

August 14, 1911.

The Guerini Stone Co., 88 Broad Street, Boston, Mass.

GENTLEMEN: Please let me know if you have taken up the matter of jointing at the U. S. P. O. & Court House, San Juan, P. R., with Washington, and with what result. In this connection, we think that Mr. Guerini at Porto Rico can arrange this down there with

Mr. Stierle, Resident Inspector, more satisfactorily. We would suggest you communicating with him at once along these lines.

We have not, as yet, heard from you with respect to a price for the face brick and enamel brick laying. We will allow you Twenty Dollars ($20.00) *for* thousand for the glazed brick, and Fifteen Dolloras ($15.00) per thousand for the cement brick. If you make the cement brick, we to furnish the machine, we will allow you Six Dollars ($6.00) additional, you to furnish all the labor and material.

Our representative, Mr. D. P. Oaksmith, is going down to relieve Mr. Sullivan on Saturday, and it is important that all these items be concluded one way or the other, before that time, and we should be glad to hear from you by return mail.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.
——— ———, *Secretary.*

J. P. C./K. M. Z.

172 EXHIBIT No. 16 FOR DEF'T, 891.

Copy.

August 5th, 1911.

The Guerini Stone Co., San Juan, P. R.

GENTLEMEN: We have yours of July 28th, asking how negotiations are progressing with regard to the additional work at San Juan. We had expected a communication from you quoting us on the various items about which we wrote you. We have not heard from your Boston office, in fact we understood you would furnish us all the necessary information and quote us the prices asked for. Please do this without delay, as otherwise we will be compelled to do the work ourselves.

We have instructed Mr. Sullivan to have you set the granite at your bid price, and a shipment of granite has already gone forward.

In the matter of the jointing, we note that you have sent several samples to Washington, and that Mr. Stierle has written to Mr. Taylor substantiating your statement with respect to the jointing, and if we hear direct, we will transmit the answer to you.

We understand that Mr. Converse has gone to Washington to take the matter up directly with Mr. Taylor and if he gets an answer before you, he will boubtless communicate with you.

173 With respect to the samples to which you refer, have you sent these direct to Washington? One or two samples you sent here were broken in transit, and could not, therefore, be submitted to Washington unless, therefore, you have sent them direct, please do so without delay, and have them properly boxed so that they will not be broken, and label it as follows:

U. S. Post Office and Court House, San Juan, P. R.
Samples for Cast Stone.
Submitted by the P. J. Carlin Construction Company.

Yours truly,

P. J. CARLIN CONSTRUCTION CO.,
——— ———, *Secretary.*

J. P. C./K. M. Z.

174 EXHIBIT No. 17 FOR DEF'T, 891.

Copy.

September 15, 1911.

The Guerini Stone Company, San Juan, P. R.

GENTLEMEN: In reply to your recent communication, regarding an order to proceed with the work at Porto Rico, we would say that we understand that you have already proceeded, having been on the ground for some months, however, to make it explicit, please proceed at once to go forward with all the work you have under contract, and particularly with the concrete walls and granite work up to and including the finish of the first floor.

Mr. Sullivan reports that the front of the building, and portions of the two returns are ready for the granite setting, and the rear of the building and the remainder of the returns, was ready before he left, for the concreting up to the point at which the granite commences.

We trust that there has been no delay on your part in expediting that portion of the work, and await confirmation from San Juan.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.,

—— ——, *Secretary.*

J. P. C./K. M. Z.

175 EXHIBIT No. 18 FOR DEF'T 891.

J-2397.

Copy.

88 BROAD STREET, BOSTON, MASS., September 16, 1911.

P. J. Carlin Const. Co., New York City, N. Y.

GENTLEMEN: We herewith acknowledge receipt of your letter of Sept. 15th and copy of your letter of the 15th sent direct to our San Juan office.

We note that you order us to proceed with the granite work which we understand is in accordance with Section No. 25 of the contract. As San Juan is so far away, please give us as much time as possible in order that we may be prepared to start any work which we are to do. We cannot land men and equipment on the job without considerable notice.

We have not yet been advised by our representative at the job as to derrick equipment, etc., but presume you have taken care of this matter in full accordance with the terms of the contract.

Yours truly,

GUERINI STONE COMPANY.

H. P. C./S.

176 EXHIBIT No. 19 FOT DEF'T 891.

Copy.

September 29, 1911.

The Guerini Stone Company, 88 Broad Street, Boston, Mass.

GENTLEMEN: Please let us have two complete sets of your approved drawings for the U. S. Post Office and Court House, San Juan, P. R. These plans are particularly required in connection with the granite work for the exterior steps, etc. and we have none in our possession at the present time.

Kindly hurry these forward as we require them at once, and oblige,

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.,

—— ——, *Secretary.*

J. P. C./K. M. Z.

177 EXHIBIT No. 20 FOR DEF'T, 891.

Copy.

88 BROAD ST., BOSTON, MASS., Oct. 9, 1911.

The P. J. Carlin Construction Co., 16 East 23rd Street, New York City, N. Y.

GENTLEMEN: Your favors of the 29th ulto. and the 7th inst. are received. We immediately sent to our San Juan office for a copy of the drawings. We do not know even if we have made any drawings. Will advise you as soon as we get a reply.

Yours truly,

GUERINI STONE COMPANY.

H. P. C./S.

178 EXHIBIT No. 21 FOR DEF'T, 891.
" " 66 " " "

Copy.

United States Public Buildings,
Office of Superintendent of Construction.
Post Office & Ct. H. Building, at San Juan, Porto Rico.

May 2nd, 1911.

The P. J. Carlin Constr. Co., New York, N. Y.

GENTLEMEN: I have been directed under date of April 19th by the Supervising Architect, to obtain proposal for the omission of all piles in the San Juan, P. R., P. O. & C. H., and in addition a proposal for carrying the piers to necessary depth as will be revealed by

the excavations, the latter to be accompanied by a sketch of drawing showing how the pier footings are actualty installed, no additional reinforcement of the footings being held necessary.

As the excavation has already been made for the south wall and the portions of the east and west walls connecting with the same to nearly the level of mean low water, you may estimate that the footings for them will be placed at that level, the average width to be about 8 feet, height about 3 feet.

179 The footings across the longitudinal axis of the building from No. 16 to 21, may not have to be carried to that depth, as I think we will encounter suitable bottom before we reach low water level. This will be determined as the excavations are being made.

I think it will save considerable time if you will send your proposal direct to the Architect instead of to me, and I will advise him that I have suggested this, with the recommendation that if your offer should be reasonable to accept it, to avoid delay. I do not know, however, whether he will do that.

It is understood that in making the proposal a certain price, to be stated by you, for the omission of all the piles, is to be taken into consideration.

Respectfully,
(Signed) A. STIERLE,
Superintendent.

180 EXHIBIT No. 22 FOR DEF'T. 891.

Copy.

The P. J. Carlin Construction Company.

SAN JUAN, May 10th, 1911.

P. J. Carlin Construction Co., 16 E. 23rd Street, New York City.

GENTLEMEN: Referring to bids for the new Y. M. C. A. building; the local sub-contractors are not prepared to furnish any estimate at the present time. Guerini will send his bid on the "Carolina" leaving here today. Mr. Lee says that he cannot get from the plans sufficient information upon which to base an intelligent bid. When you send the proposal, I suggest that you forward a duplicate leaving a blank space for a plumbing figure. In the very improbable event of my getting a low bid, I will use it in place of the one contained in your original estimate. There seems to be very little local interest in the award of this contract. We are this day installing concrete footing at the S. W. corner of the building, the piles shown on original plan for this part of the site having been omitted, in accordance with verbal instructions from Mr. Stierle, who has also verbally directed us to raise the footings, at this point, one foot.

181 Mr. Stierle received today setting plans for the granite and steel. Copies of these plans, also bases and anchor bolts, should be sent as soon as possible.

Very truly yours,
(Signed) F. T. CARLIN.

EXHIBIT No. 23 FOR DEF'T, 891.

WASHINGTON, D. C., May 13th, 1911.

The Supervising Architect, Treasury Department.

SIR: Referring to our contract for the Federal Building at San Juan, P. R., and to the fact that it has been decided that piles are not necessary, we hereby propose to deduct the sum of $5,478.00 for their omission, with the understanding that if any changes become necessary in the foundations in the future the price shall be settled in accordance with the unit rates of our contract.

Respectfully,

—— ——.

(Typewritten in Office of Sup. Arch.)

182 EXHIBIT No. 24 FOR DEF'T, 891.

Copy of Telegram.

A-270. Ch. 54. Gov't Rate.

WASHINGTON, D. C., May 15, ——.

The P. J. Carlin Construction Co., 16 E. 23rd Street, New York City:

Your proposal May thirteenth accepted to deduct five thousand four hundred seventy-eight dollars your contract San Juan postoffice for omission piling should changes in foundation be necessary hereafter they will be settled upon contract unit rates.

BAILEY,
Ass't Secretary.

5.06 p. m.

183 EXHIBIT No. 25 FOR DEF'T, 891.

Copy.

May 17, 1911.

Superintendent of Construction, Post Office Building, San Juan, P. R.

SIR: As it appeared from statements made by you, and reports on tests made, that the subsoil is sufficient to safely carry the building in your charge without piles, a proposal for their omission was obtained from the P. J. Carlin Construction Company, and on May 15th the following telegram was set them, a copy of which has been mailed to you:

"Your proposal May thirteenth, accepted to deduct five thousand four hundred seventy-five dollars, your contract San Juan Postoffice, for omission piling. Should changes in foundations be necessary hereafter they will be settled upon contract unit dates."

Today the following dispatch was sent you, which is hereby confirmed:

"Department has accepted Carlin Company's proposal to omit all piles. Order pier footings carried to depths required, and forward drawing showing work as actually installed. Letter."

Upon receipt of the drawing showing the work as installed this office will be in position to take up the question of settlement with the contractors for the extra work upon the basis of the contract unit rates.

Respectfully,

——— ———,
Supervising Architect.

J. S. S.

184 EXHIBIT NO. 26 FOR DEF'T, 891.

Copy.

SAN JUAN, October 28, 1911.

The Guerini Stone Company, San Juan, P. R.

GENTLEMEN: This is to notify you that the work of stone setting is not progressing as satisfactorily as it should. We were informed a short while ago that you were getting stone setters from the U. S. and that they were to arrive on the Str. "San Juan" which arrived here yesterday, but sorry to say there were no stone setters aboard.

We now insist that you cable at once for two first class stone setters, whether you get them from New York, Boston or any other city is immaterial, but would suggest that you get them from some city where they can arrive here in a hurry.

If we fail to receive satisfactory reply and results, to this letter, we will be compelled to avail ourselves of the clause in the contract relating to such matters.

Hoping that you will comply with our wishes, we remain,

Very respectfully,

(Signed) THE P[J. CARLIN CONSTRUCTION CO.
D. P. OAKSMITH.

185 EXHIBIT NO. 27 FOR DEF'T, 891.

Copy.

November 14, 1911.

The Guerini Stone Company, San Juan, P. R.

GENTLEMEN: The reports that we received from San Juan, and the photographs showing the progress of the work, indicate clearly that you are not making the progress necessary to complete this work on time. You have had the advantage of familiarizing yourself with the conditions in Porto Rico, and we sincerely trust that you have taken advantage of the opportunity to cast and mould much of your stone for the superstructure.

It is confidently expected that all the granite except the ap-

proaches, etc. on the exterior will be delivered on, or before, January 1st, but it is urged that you immediately start the cast stone setting without waiting until the granite is levelled all the way round. If you will do this and have moulded your stone considerably in advance, we believe, that you will finish the cast stone setting within the following four months. We, of course, agree to see that the other depending work, such as the brickwork and the steel erection shall not in any way delay you.

Will you kindly, upon receipt of this give us the status of the work and what your intentions are with respect to a schedule for carrying it out, and completing it.

Yours very truly,

P. J. CARLIN CONSTRUCTION CO.

J. P. C./K. M. Z.

186 EXHIBIT No. 28 FOR DEF'T, 891.

Copy.

SAN JUAN, November 18, 1911.

Guerini Stone Co., San Juan, P. R.

GENTLEMEN: Your favor of even date is at hand; contents of same carefully noted and considered.

We fail utterly to see wherein we have been the cause for any friction whatsoever between you and your employees; but we do agree with you, however, on the difficulty of securing proper help in this Island, as witness the very slow progress of the work under question. In this connection we would again ask you when you will have competent stone cutters of a sufficient number on this job?

In regards to the various questions raised with us by the Gov't Sup't, this date, which form part of your contract, and of which our Mr. J. J. Carlin spoke to you today, we would like a definite understanding of your intentions in these various matters which becomes on your part owing to the insistence of the United States Government Representative.

Kindly give these matters your immediate attention, and oblige,

Yours very truly,

(Signed) P. J. CARLIN CONSTRUCTION CO.

D. P. O.

187 EXHIBIT No. 29 FOR DEF'T. 891.

Copy.

88 BROAD ST., BOSTON, MASS., November 18, 1911.

P. J. Carlin Const. Co., New York City, N. Y.

MY DEAR MR. CARLIN: Your letter of the 16th inst. regarding Guerini is received, and I am greatly disturbed over the matter.

Mr. Guerini is an Italian and has the excitable nature of his race, and it is too bad if he is doing loose and indiscriminate talking. I would ask that Mr. John J. Carlin, who is in Porto Rico and yourself, be as considerate as you can with him in the matter.

I believe him to be a fine able man in his line, and we should be able to hold him down to his particular work and keep him from mixing in other affairs.

Our Mr. Follett is quiet and careful and I had expected that all intercourse and matters that needed adjustment would be worked out through him, so that there would be no misunderstandings.

As you have undoubtedly noticed, Mr. Guerini's English is very bad and in my two trips in Porto Rico, I noticed his very great change for the worse in his English. He seems to have great difficulty in expressing himself and when he does get it out, it seems to explode like gun powder which has been under pressure.

188 I am glad to not your statement that you will offer what assitance you and Mr. John J. Carlin can in the matter and I have already sent a letter to Mr. Guerini and also to my nephew, Mr. Follett by special messenger, who is leaving New York on the boat today.

We are sending down two good stone cutters and a carpenter and two of the men are especially good all around men.

As soon as I have a letter from Mr. Follett regarding the matter, and in passing I would say that we had a cablegram from him yesterday, I will go to San Juan myself if neccessary.

Be assured that we shall take hold of the matter vigorously and have it straightened out and if necessary will take Mr. Guerini away from the job, as we have another man who is capable in modeling and in handling concrete in its most ornate forms.

I thank you for the consideration you have shown us in writing fully in the matter.

Yours truly,

(Signed) GUERINI STONE CO.,
H. P. CONVERSE.

H. P. C./S.

189 EXHIBIT No. 30 FOR DEF'T. 891.

Copy.

November 21, 1911.

The Guerini Stone Co., 88 Broad St., Boston, Mass.

GENTLEMEN: Yours of November 18th is acknowledged, and we are glad that you appreciate the necessity for harmony. Further letters from Porto Rico show that Mr. Guerini is, if anything, worse than he was before. Also, that the progress which he is making is extremely slow and that he is greatly handicapped because he has no competent help. It seems that he has promised to have an American carpenter foreman and two granite setters; but up to November 15th these had not arrived. We are certain that it would be economy for you to have these men on the ground, and we earnestly

request that you do so, as we cannot possibly make any impression on Mr. Guerini.

Our Mr. John J. Carlin informs us that he tried to get Mr. Guerini to leave the concrete exposed on one side, rough, which had to be subsequently plastered. Notwithstanding that it was evident economy for Mr. Guerini, he insisted on using planed boards and making a plane surface. Your Mr. Follett is evidently an easy man to get along with, but Guerini objects to anybody taking anything up through Follett. Perhaps another strong letter from you to Mr. Guerini would clear the situation somewhat.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.,
—— ——, *Secretary.*

J. P. C./L.

190 EXHIBIT NO. 31 FOR DEF'T. 891.

J-2397.

Copy.

88 BROAD ST., BOSTON, MASS., November 29, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: We have this day received from our San Juan office copy of their letter to you of November 18th. We regret that there should have been any friction and think that the matter is being gradually smoothed out. However, as previously stated to you, Guerini becomes easily excited and if our Mr. Follett and your Mr. John Carlin will have this in mind and will endeavor to put in matters of importance through Mr. Follett and this office, we think we can get along comfortably.

Please ask Mr. John Carlin to help us out in the matter, as I am sure he will, even without our asking it. If it is necessary, we shall replace Mr. Guerini at once as we have at the present time a man available for this work who is in our opinion equally skilled in the art with Mr. Guerini. I have cabled Mr. Follett that we can replace Mr. Guerini at very short notice if necessary.

We had a cable a few days ago stating that things were running smoothly, but until we get our next letter we shall know very little of the personal side of the situation. We understand that the work is running smoothly and is in good shape.

Yours truly,

GUERINI STONE CO.,
H. P. CONVERSE, *Pres.*

H. P. C./S.

191 EXHIBIT NO. 32 FOR DEF'T, 891.

J-2397.

Copy.

88 BROAD ST., BOSTON, MASS., December 4, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your favor of the 29th ulto., regarding the situation in San Juan is received. We have received no further news as to the situation but have this day cabled to have Mr. Guerini come back to Boston by the boat leaving San Juan Wednesday of this week.

It is our desire to do everything which is possible on our part to make the job run smoothly. When we get a little more information from Mr. Follett, we will come to New York and talk matters over if it seems as though that would benefit both you and ourselves.

We hope you will write Mr. John Carlin and call his attention to the fact that Mr. Guerini has been down there since last February, away from his family, with little to do and was very seriously sick through his vaccination for typhoid fever. We do not doubt but that Mr. Guerini is in a highly nervous state and will greatly regret anything which he has said to the detriment of the Carlin Co. or anyone else.

Yours truly,

GUERINI STONE CO.,

(Signed) H. P. CONVERSE, *President.*

H. P. C./S.

192 EXHIBIT NO. 23 FOR DEF'T, 891.

Copy.

December 12, 1911.

Guerini Stone Co., 88 Broad St., Boston, Mass.

GENTLEMEN: Replying to yours with respect to granite work for San Juan postoffice, we would say that we have now delivered nearly 5,000 cubic feet; and during the preceding month, only 199 cubic feet of granite was actually set. The entire balance, with the exception of some 100 pieces, is now cut at Providence and ready for shipment and we will expect it to be shipped not later than December 20th; and so, therefore, put all of the granite in San Juan, for the building proper, on or about January 1st, 1912. Please bear in mind that there is a considerable quantity down there not set.

You understand that we gave this granite setting to you to keep your men going; and, having the derrick equipment and the power there, we could have done this setting ourselves. Unless there is some satisfactory reason for this poor showing on the setting of the

granite during the last month, we shall be obliged to set the remainder ourselves as this work cannot be any longer delayed. We understand Mr. Guerini is now in Boston. Please let us know what your intentions are with respect to this granite work.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.,
—— ——, *Secretary.*

J. P. C./L.

193 EXHIBIT No. 34 FOR DEF'T, 891.

Copy.

SAN JUAN, April 27th, 1911.

P. J. Carlin Const. Co., 16 E. 23rd St., New York City.

GENTLEMEN: We have had no word from Washington regarding the revision of the foundation plan or the omission of piles. Mr. Stierle tells me that he has not received any acknowledgment of his report posted April 3rd, 1911. If on receipt of this letter you have had no information from Mr. Taylor, I would suggest that the Supervising Architect be requested to make an immediate and final disposition of the matter. I have asked Mr. Stierle to cable Washington for information as to what action, if any, is being taken regarding his recommendation that piles be eliminated and the elevations of the footings be raised. Whether he is in possession of information which he is withholding from me, I cannot say, but he is constantly and confidently expressing his conviction that the foundation plan is being revised. However, the work has advanced to such a point that any further delay in securing a final decision would be exceedingly unwise.

Yours truly,

(Signed) F. T. CARLIN.

194 EXHIBIT No. 35 FOR *DEF'T*, 891.

Copy.

December 14, 1911.

Guerini Stone Co., 88 Broad Street, Boston, Mass.

GENTLEMEN: Receipt of yours of December 13th, with respect to the San Juan, Porto Rico, work, is acknowledged. As you were informed in ours of December 12th, there are 5,000 cubic feet of granite at Porto Rico, of which less than 500 cubic feet has been cut. The balance, to which we referred in ours of the 12th inst, is ready with the exception of probably 100 odd pieces, and will be shipped from Providence within ten days. The remaining 100 more or less pieces will be sent forwarded on steamer before the first of the year. From this you can plainly see that there can be no reason for delay;

and we sincerely trust that you will at once notify us of your intention to put sufficient men on the work to complete it as requested.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.
—— ——, *Secretary.*

J. P. C./L.
C./C.-J. J. C.

195 EXHIBIT No. 36 FOR DEF'T, 891.

Copy.

December 19, 1911.

Guerini Stone Co., 88 Broad St., Boston, Mass.

GENTLEMEN: We have yours of December 18th with reference to the San Juan, P. R. work, and we are glad to know that Mr. Lootz will take charge at Porto Rico. Mr. John J. Carlin will be directed and requested to assist Mr. Lootz in every manner possible.

Regarding the granite, we have at the present time between 4,000 and 5,000 cubic feet actually on the site. This constitute- between 80% and 85% of the total quantity required for the work. The entire balance is completely cut and boxed at Providence, and a lighter is on its way to Providence to pick this up for delivery to Erie Basin in New York. This granite goes forward on December 30th and will be in Porto Rico within five days thereafter. This is all of the granite required for the building excepting only the approach and the curbing.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.,
—— ——, *Secretary.*

J. P. C./L.
C./C.-J. J. C.

196 EXHIBIT No. 97 FOR DEF'T, 891.

Copy.

SAN JUAN, January 9, 1912.

The Guerini Stone Company, Sub Constractor The U. S. P. O. & Ct. House.

GENTLEMEN: We are compelled to write you in regard to your inattention to the many verbal requests of the writer regarding the finishing of the concrete work where it comes in contact with the granite.

Namely, the concrete being too low for the bedding of the granite. We respectfully refer you to the specification page 8, which says concrete must be protected from the sun and kept wet for at least (48) Forty-eight hours.

If the parts spoken of are not taken in hand while yet green, there is a possibility of it not bonding properly.

This also applies to places recently chiseled off where built in error.

Please see to it that we may avoid censure from the Architect or his representatives.

Yours respectfully,

(Signed) THE P. J. CARLIN CONSTRUCTION CO.,

Per JOHN J. CARLIN, *Vice President.*

197 EXHIBIT No. 38 FOR DEF'T 891.

Copy.

SAN JUAN, Jan. 18th, 1912.

The Guerini Stone Company, San Juan.

GENTLEMEN: We desire to call your attention to the necessity of arranging the "J" course in accordance with the dimensions shown on the stone setting drawing and the architects floor plan of 1st story, Plan No. 3.

Sometime ago when your Mr. Follett and our Mr. Oaksmith checked up the S. E. pavilion they found a small difference and it was then agreed to adjust it when we reached the setting of "J" course.

We find that instead of doing now that which was then agreed upon you are proceeding in direct contradiction thereto. You must remember that in order to set the artificial stone correct—which is another part of your contract—it is necessary to have the granite work fit, as the contractor for that expects, which would avoid delay that would occur if the granite has to be cut, all of which can be avoided if the above plan is followed.

We notice you have set the granite at the S. E. corner pavilion from course "G" up to course "J" included in a very poor and unmechanical manner and not in accordance with the plans and specifications for granite work. We have been informed by
198 your Mr. Russell that he will take down H, I and J course at the S. E. corner and reset same after they have been cut down, this in order to make the bed joints of the courses, above quoted, horizontal and mechanically correct. You will kindly advise us when the same is complete and ready for inspection.

We are anxious to know definitely what you propose to do in the matter of the concrete wall which encloses column No. 17 which you have not built in accordance with the architect's and contract drawings. We have previously called your attention to this verbally, to your Mr. Lootz and your Mr. Russell. Please note it should be made to suit the architect's drawings.

In conversation yesterday with your Mr. Follett, we were informed that you did not propose to make any more shop-working, or setting plant, but would follow strictly the architect's drawings. We hope you will see the necessity of checking up the granite work as set to the top of course "I", in order that the many projections,

panels, recesses, pilasters, columns, offsets, window and door openings as are shown on the many scale and F. S. drawings will be correctly placed.

Kindly let us know at once your intentions in regard to this matter, so as to avoid delay or mistakes later which would not be a valid excuse for delay.

We earnestly request that you will cooperate to the end requested, and await an early reply.

We are,

Very respectfully yours,

P. J. CARLIN CONSTRUCTION CO.
D. P. O.

199 EXHIBIT No. 39 FOR DEF'T, 891.

Copy.

February 3, 1912.

Guerini Stone Co., 88 Broad Street, Boston, Mass.

Attention of Mr. Converse re San Juan (P. R.) Post Office.

MY DEAR MR. CONVERSE:

We are in receipt of a letter from Porto Rico stating that the new Superintendent, Mr. Berryman has requested that the forms for the artificial stone work be gotton out at once in order that there may be no delay. We were under the impression that most of this form work was ready. Will you kindly take it up at once and urge haste in the matter; and also that the specification requirements with respect to heavy dressed lumber be followed. There ought to be considerable of this dressed lumber, such as is used by pattern makers, and we think a good deal of it could be prepared now.

The writer, at the present time, expects to sail on the 17th of February and will, if you say so, make reservation for you at the same time. If I change or find it impossible to go, I shall inform you at once.

Very truly yours,

P. J. CARLIN CONSTRUCTION CO.
—— ——, *Secretary.*

J. P. C./L.
C. C. — J. J. C.

200 EXHIBIT No. 40 FOR DEF'T 891.

Copy.

February 9, 1912.

P. J. Carlin Const. Co., San Juan, P. R.

GENTLEMEN: As we will have set all granite ashlar that is on the job and ready to be set, by next Monday, February 12, we want to take advantage of the arrangement made between our Mr. Con-

verse and your Mr. Joe Carlin at your New York office to take off of our hands the granite setting. Therefore after Monday, February 12, we will set no more of the ashlar and will not try to keep our stone cutters here. All the granite walls are up as far as the ashlar extends except where the stones were cut wrong, as over the two driveways and at the entrance at the N. E. corner of the building, and the window where the mixer runway enters the building.

Yours truly,
(Signed) GUERINI STONE CO.
G. A. FOLLETT, *Agent.*

(Copy gone to New York Feb. 9th.)

201 EXHIBIT No. 41 FOR DEF'T 891.

Copy.

SAN JUAN, March 25, 1912.

P. J. Carlin Const. Co., San Juan.

GENTLEMEN: Referring to the matter of the footings of the New Post Office Building this City; you are informed that the recent investigation by Supt. Berryman and myself has shown that practically the entire building must be underpinned in order to secure safe foundation. I have communicated this fact to the Department at Washington and I am in receipt under date of 23 a cablegram directing me to prepare drawings and specifications for the necessary work and to obtain a proposal from you therefor with the distinct understanding that acceptance is subject to subsequent settlement of responsibility for the departures from the contract drawings,—on account of which the underpinning is necessary.

As additional work will be necessary in connection with the main walls and loggia walls of the north and east sides, and in order that the force may be expedited with the force now in hand, the Superintendent will interpose no objection to your commencing excavation adjacent to the above mentioned walls. This excavation will be subject to the conditions regarding acceptance of your proposal as above stated and must not in any case be carried below the
202 bottom of the footings, pending action upon your proposal by the Department at Washington.

The drawings and spec. will be handed you at the earliest possible date for estimate.

Please acknowledge receipt of this letter, stating whether the procedure above outlined, in regard to porposal, is satisfactory to you, pending reference of the whole matter to the Department for settlement.

Respectfully,

E. C. HEALD,
Structural Engineer.

203 EXHIBIT No. 42 FOR DEF'T 891.

Copy.

Treasury Department.

WASHINGTON, March 30, 1912.

P. J. Carlin Construction Co., 16 E. 23rd Street, New York, N. Y.

SIRS: You are hereby advised that the personal representative of this Department, now in San Juan, Porto Rico, has been instructed to stop all work on Postoffice in that city, pending the settlement of responsibility for deviations from contract requirements regarding foundations.

Respectfully,
(Signed) R. O. BAILEY,
Assistant Sec't'y.

204 EXHIBIT No. 43 FOR DEF'T 891.

Copy.

Treasury Department,
Office of Supervising Architect.

SAN JUAN, P. R., April 1, 1912.

San Juan, P. R., P. O.

P. J. Carlin Construction Co., c/o San Juan Office.

GENTLEMEN: I have to advise you that on the 29th ultimo I cabled to the Department at Washington your proposal of same date, in which you propose to perform all work necessary to reconstruct the foundations of the new Post Office building, this city, for the maximum sum of Twenty Thousand Dollars; and in which you disclaim responsibility for any settlement on account of the changes in foundation design.

I am in receipt of a cablegram of 31st ultimo, from Assistant Secretary Bailey, which reads as follows:

"Replying your cable twenty-ninth, responsiblity for deviations in foundations must be settled previous to action on yroposal. Therefore order work on Post Office San Juan stopped, and return to Washington as soon as practicable with full data regarding responsibility."

Accordingly, I have to direct you to indefinitely suspend all work upon this building, pending further orders to you from Superintendent Berryman; and to advise you that I shall return to Washington on 3rd inst. to take up this matter.

Respectfully,
(Signed) E. C. HEALD,
Structural Engineer.

205 EXHIBIT No. 44 FOR DEF'T 891.

Copy.

Treasury Department,
Office of Assistant Secretary.

WASHINGTON, April 16, 1912.

San Juan, P. R., P. O.
S. A.-T.

P. J. Carlin Construction Co., 16 E. 23rd St., New York, N. Y.

SIRS: Referring to previous correspondence regarding unsatisfactory foundation work and deviations from the contract requirements in connection with your contract for the erection of the Post Office & Court House at San Juan, Porto Rico, and especially to letter addressed to you by the Supervising Architect on the 12th instant, and your reply thereto, in which you request permission to proceed with certain contemplated changes, leaving the question of responsibility for future consideration, you are advised that the following telegram has been received from Supt. Berryman, under date of the 13th inst.:

"Borings show layer sand from one to four feet thick; soft black muck four to eight feet thick underlies, and then coral rock throughout building. Letter."

This changes conditions, and it is probable that extensive modifications will have to be made in the foundations, which, however, cannot be determined positively until the report of Supt. Berryman is received and all the details fully considered. This condition of affairs will make it inadvisable for you to resume building operations until further instructions can be given you.

Respectfully,
(Signed) A. PRATT ANDREWS,
Ass't Sec'y.

206 EXHIBIT No. 45 FOR DEF'T 891.

Copy.

San Juan, P. R.—P. O. & Ct. H.

Proposal Sheet.

SAN JUAN, P. R., March 29th, —.

The Supervising Architect, Treasury Department, Washington, D. C.

SIR: We hereby propose to furnish all labor and materials required to reinforce the foundations of the U. S. Post Office and Court House building at San Juan, Porto Rico, in strict accordance with drawings No. F-1, the specifications dated March 29, 1912, and the

instructions of the Superintendent of Construction, for the total cost of same, plus 10%.

We guarantee that the total cost to the Government will not exceed Twenty Thousand Dollars ($20,000.00).

The different portions of work embraced are estimated as follows:

North Main Wall not to exceed	$3,400.00
North Log-ia Wall not to exceed	3,100.00
East Main Wall not to exceed	1,900.00
South Wall not to exceed	2,200.00
West Log-ia Wall not to exced	1,600.00
Cols. 1, 2 and 4	600.00
" 3 and 17	1,100.00
" 5 and 6	800.00
" 7 and 8	1,000.00
" 9 and 10	600.00
" 11, 19. 20 and 21	1,500.00
" 12 and South Corridor Wall	1,700.00
" 16	500.00

207 In submitting this proposal, it is understood that neither the Government nor the constructor makes acknowledgment of the responsibility for the changes from the contract requirements and that acceptance of this proposal is conditional upon subsequent settlement of such responsibility by and between the Department and the contractor. We further also disclaim any responsibility for any settlement or damage that may result by reason of these changes in the foundation.

(Signed) P. J. CARLIN CONST. CO.
J. P. CARLIN, *Sec't'y.*

Name of corporation ——.
Name of President —— ——.
Name of secretary —— ——.
Under what law corporation is organized ——.

208 EXHIBIT No. 46 FOR DEF'T 891.

Copy.

April 3, 191–.

Guerini Stone Company.

GENTLEMEN: The receipt of yours of March 29th is acknowledged. Regarding the work in the foundation, it is believed that all of the work outlined by the Government engineers will require about two months to completely finish. The entire South wall and the entire East walls, however, will be completed ready for your work in not more than two weeks and the only delay will be on the north wall. As you have much exterior from work to do prepare, in advance of pouring the concrete, it certainly seems that this should be done now.

Upon my arrival, the writer endeavored to use your men wher-

ever possible but for some reason they refused. We are ready now to use these men, but can see no reason to pay you a percentage on their wages as their cost to us is more than local labor. Again the object of using them is of mutual benefit, to keep them here and expedite the progress of your work.

In the matter of the concrete mixer and appurtenances, we desire to use it only on the North wall and possibly a few center piers. As we can use it only spasmodically, it would be manifestly unfair to charge us for its continuous time. We are willing, however, to pay you $8.50 per day, and nothing less than ½ day to be chargeable, for the actual time in use.

Respectfully,
(Signed) P. J. CARLIN CONST. CO.
J. P. CARLIN.

209 EXHIBIT No. 47 FOR DEF'T 891.

Copy.

May 31, 1912.

Guerini Stone Co., 88 Broad Street, Boston, Mass.

GENTLEMEN: Re: San Juan (P. R.) Post Office.

We have yours of May 22nd, 1912, received on May 29th, in which you abandon your contract for the cast concrete and other work in the San Juan Post Office and Court House. Said letter is a breach of contract on your part, and we shall immediately proceed to have the work done by other parties, and shall charge you with the additional expense, if any, above your contract price.

Very truly yours,
P. J. CARLIN CONSTRUCTION CO.
J. P. CARLIN, *Secretary.*

J. P. C./L.
C./C.—D. P. O.

210 EXHIBIT No. 48 FOR DEF'T 891.

(Original copied in letter book New York.)

Copy.

April 27, 1912.

Supervising Architect, Treasury Department, Washington, D. C.

SIR: Re: San Juan (P. R.) Post Office.

Referring to the proposed underpinning of foundations for the San Juan Post Office and Court House building, we desire to suggest a slight modification which will reduce the cost several thousand dollars. It is proposed to cut off the projections on all footings and then drive on both sides of the wall to be underpinned a row of 12″ yellow pine piles driven to rock and cut off at mean low water. These piles will then be capped with a continuous slab of

reinforced concrete and caught up under the present wall. Since these piles are column piles, there could be no objection to driving them as closely together as possible; and, if any objection were made to the distance between parallel rows of piles (that is 3′ 6″, in to in, or 4′ 6″, C to C), their heads could be slightly drawn together by the use of a jet and turnbuckle, after driving. This we have frequently done. It will be seen that this practically returns to the
211 original method of piling the foundations, excepting that there will be two piles to every linear foot of wall, whereas the original design showed a bent of four piles every 2′ 4″ of wall, thus giving an equivalent number of piles per linear foot. Where the walls show staggered piles, the parallel piles may be spaced a little farther apart.

If this method be followed, we would agree to make the proposed changes in the foundation at absolute cost and guarantee that this cost will not exceed Thirty-six Thousand Dollars ($36,000.00).

Respectfully submitted,

P. J. CARLIN CONSTRUCTION CO.

(Signed) J. P. CARLIN, *Secretary.*

J. P. C./L.

212 San Juan, P. R., P. O.

Copy.

S. A.—T. C.

TREASURY DEPARTMENT,
OFFICE OF ASS'T SEC'T'Y,
WASHINGTON, May 4, 1912.

Bond.

The P. J. Carlin Construction Company, 16 East 23rd Street, New York City.

GENTLEMEN: In accordance with Department approval of even date, your proposal, dated April 27, 1912, supplemented by letter of April 30, 1912, is accepted, the public exigency requiring the immediate performance of the work, to make changes in the foundations of the Post Office building at San Juan, Porto Rico, as set forth in your said proposal, and as illustrated by the sketch submitted in your letter of April 30th, which is to form the basis for drawings and specifications to be prepared in this Department to govern the work.

It is understood and agreed that you are to be paid the absolute cost of the work—which it is noted you guarantee will not exceed Thirty-six Thousand Dollars ($36,000)—payment to be made upon certified bills rendered by you for the labor and material involved, approved by the Superintendent of Construction, from the appropriation for "Post-Office, San Juan, Porto Rico."

213 It is further understood and agreed that the time for the completion of the entire work under your contract for the construction of the above mentioned building, is to be extended from November 1, 1912, to May 1, 1913.

The above work is to be in addition to your present contract—and so subject, generally, to all its stipulations and covenants—upon the express condition that the same is without prejudice to any and all rights of the United States under said original contract and bond, and that you shall first furnish the formal consent of the surety on your bond to said modification, and also to the extension of the time for the completion of the entire work.

A form for such consent will be forwarded which you are requested to have executed immediately and return to this Department.

Respectfully,

(Signed) R. O. BAILEY,
Ass't Secretary.

214 San Juan, P. R.

Memorandum Specifications for Underpinning Foundations of the United States Postoffice, Court House, ect.

215 Memorandum Specification for Underpinning Foundations United States Post Office, Court House, etc.

San Juan, P. R.

TREASURY DEPARTMENT,
OFFICE OF THE SUPERVISING ARCHITECT,
WASHINGTON, D. C., May 22, 1912.

The work of underpinning the foundations of this building is that included in the proposal of the P. J. Carlin Construction Company, April 27, 1912, as modified in letter from the same Company April 30, 1912. This work was ordered in Departmental acceptance of May 4, 1912; which stated that drawing and specification governing the work would be prepared in this Department.

All work of underpinning shall, therefore, be done in accordance with drawing No. 120, this specification, and the instructions of the Superintendent. All work not covered by drawing No. 120 and this specification shall be done in accordance with the terms of the contract existing on May 3, 1912; and the conditions governing the execution of the work shall be those stated in that contract.

The contractor will assume all risk in connection with the work and will be responsible for all damage to person or property which may occur on account of the execution of the contract. He shall make good at his own expense any injury to work already constructed.

216 Work Included.

The work included in Departmental acceptance of May 4, 1912, is the underpinning the entire building to rock, found to underlie the entire site, as follows:

(1) The north walls shall be underpinned by concrete piers, wedged up under present footings.

(2) Except as shown on drawing No. 120, all wall and column footings in interior of building shall be removed, and replaced with new pile foundation.

(3) The east, south and west walls shall be underpinned by a new reinforced concrete footing, supported on piles driven on either side of present walls.

Modifications.

The exact point of change from pier footings to pile footings, on east and west walls, is not fixed; and must be determined by conditions encountered in doing the work. All other work, however, must be done exactly as shown; and no change shall be made from the procedure required by the drawing and specification without the written consent of the Supervising Architect.

Excavation.

All excavation shall be done in such a way as to avoid injury to the existing structure. Contractor shall furnish bracing, sheet-piling, etc., where necessary; and shall do all pumping required to keep pits free from water. Pumping must be done in such a manner as to withdraw no soil from under portions not yet underpinned.

If desired by contractor, the entire interior of the building
217 or any part thereof, may be excavated to any depth not greater than the depth of the footings which will be underpinned. In this event earth so removed shall be replaced to under side of basement floor, and shall be puddled and tamped in layers not exceeding 12″ in thickness.

The old fort wall in the northern portion of the building shall be removed to at least five feet below the basement floor.

Upon completion of work, all excavations shall be backfilled to receive basement floor. Backfilling may be done with material taken from the excavation, and must be puddled and tamped as above specified.

Concrete.

All concrete shall be mixed by a machine of type satisfactory to the Supervising Architect; and must be mixed so thoroughly that every particle of aggregate shall be coated with mortar. Concrete shall be mixed fairly wet; but it must be able to support the aggregate and not be sloppy. The necessary amount of water for each batch must be determined; and provision made to insure that the requisite amount is added to each batch.

Concrete must be thoroughly worked or rodded while being poured, so as to insure a mass of maximum density.

Wall Footings.

Where necessary for the installation of new underpinning work,

present wall or pier footings may be cut off close to the wall
218 or pier. The footings of one bay in each three bays may be so cut at one time. Cutting must be done in such a manner as not to injure the present structure.

Pier Underpinning.

Piers for underpinning north walls shall be of concrete of same composition as specified for footings.

The rock under the piers shall be leveled off to receive the concrete; and all loose or disintegrated rock shall be removed.

Forms must be tight, well braced, and of ample strength.

Concrete shall have set for three days before brick topping and wedging is built; and shall have set for seven days before forms are removed. Work may be done simultaneously on not more than every third pier.

Mortar for brick topping of piers shall be one to three Portland cement mortar.

Brick shall be selected, hard-burned brick, free from cracks, laminations, or other defects. Local brick may not be used for this work.

Contact between brick topping and bottom of present footings shall be secured by one or more courses of brick wedges. Split the brick to the required shape; lay the lower wedges in a full bed of mortar; butter the tops of upper and lower wedges; and shove upper wedges in to full bearing.

Pile Underpinning.

Piles shall be of yellow pine, straight, sound, free from de-
219 fects, and cut from live trees. They shall be not less than 12″ diameter at the head, exclusive of bark or bell ends; and not less than 10″ diameter at the point. Points shall be square. Bark shall be removed from all wood in contact with concrete.

Piles may be driven with steam-hammer, or with water jet, or both; but if jetted down, they must be given a sufficient number of blows with the hammer to insure a firm bearing. Piles shall be driven to a firm bearing on the rock; but shall be driven so carefully as not to broom nor split the piles. Piles shall be cut off level at elevations noted, and all broomed heads shall be cut off before placing any concrete. Piles may be shifted slightly after driving; in which case the soil shall be loosened around the piles with a jet so as to avoid springing the piles.

Concrete for pile caps shall be composed of one volume of cement, two of sand, and four of stone aggregate no piece of which exceeds 2″ in its greatest dimensions. All pile caps shall be built in forms. In connection with underpinning present walls, forms must be at least 2″ higher than the bottoms of the present footings. The concrete shall be brought to within approximately 1″ of the bottom of the present footings; the remainder of the space to be grouted with one to two cement mortar, which shall be flowed in from one side only, until it is forced through on the far side to such a height

as to insure a full bearing against the bottom of the present footings. Concrete shall be allowed to set at least 24 hours before the grout is poured.

220 Lay a bed of concrete, finishing level, and flush with the tops of the piles. On this bed place the rails, one rail over each pair of piles. Care must be taken not to displace the rails in placing the concrete above the level of the tops of the piles.

Rails shall be standard T-rails, weighing not less then 60 pounds per yard. Second hand rails will be accepted; but must be sound and free from defects; and must be free from rust when placed.

Reinforcing bars must be free from rust when placed; and must be so secured in position that they cannot be displaced while the concrete is being poured.

JAMES KNOX TAYLOR,
Supervising Architect.

221 EXHIBIT No. 50 FOR DEF'T, 891.

Copy.

San Juan, P. R., P. O.

S. A.—T. C.

Formal Consent.

TREASURY DEPARTMENT,
OFFICE OF ASSISTANT SECRETARY,
WASHINGTON, July 3, 1912.

The P. J. Carlin Construction Co., 16 East Twenty-third Street, New York City.

GENTLEMEN: Referring to your contract for the construction of the Post Office building at San Juan, P. R., and to the fact that on account of the underpinning changes you will not be able for several months to incorporate in the building certain materials which you have already shipped to San Juan, and certain other materials which you have now ready for shipment, you are advised that, in view of the said conditions, and in accordance with the request contained in your letter of June 7th, the Department hereby agrees to such modification of your contract as will permit of a partial payment to you, equal to 50% of the value of the materials already delivered by you on the site, and of the materials which are now ready for shipment as stated in your said letter (copy of which will be forwarded to the superintendent) hereafter to be delivered on the site, or on such Government property as the superintendent may direct. Such payment will be made for such

222 materials only as are actually so delivered, and as, in the opinion of the superintendent, are suitable for use in the work, the value of such materials to be determined by the superintendent, and not taken from your letter, and the payment in no

case to exceed $40,000.00. It is understood and agreed that such materials shall become the property of the Government upon such partial payment being made. It is understood, also, that at the time of final inspection of the work all the materials must be in strict accordance with the contract requirements, and that no allowance will be made for any deterioration which may occur due to the storage of materials; and that any materials which are not strictly in accordance with the contract requirements shall be removed and replaced with satisfactory materials.

This action is taken upon the express condition that the same is without prejudice to any and all rights of the United States under your contract and bond, and that you shall first furnish the formal consent of the surety on your bond to such payment. A form for consent of your surety will be forwarded, which you are requested to have executed and return at once to the Office of the Supervising Architect.

This payment will be made from the appropriation for "Post-Office and Court House, San Juan, Porto Rico."

A copy of this letter will be forwarded to the Superintendent.

Respectfully,

(Signed) R. P. BAILEY,
Assistant Secretary.

223 EXHIBIT No. 51 FOR DEF'T, 891.

Copy.

San Juan, P. R.

J. A. P. L.

TREASURY DEPARTMENT,
OFFICE OF SUPERVISING ARCHITECT,
WASHINGTON, April 19, 1911.

Superintendent of Construction, Post Office and Court House, San Juan, Porto Rico.

SIR: Referring to your letter of the 18th ultimo, relative to placing piles at the building in your charge, you are directed to obtain a proposal for the omission of all piles; also a proposal for carrying the piers to the necessary depth as revealed by the excavation, accompanying the same with a drawing showing how the pier footings are actually installed. No additional reinforcement of the footings is considered necessary.

Attention is called to the fact that the unit rate given in the proposal sheet for the omission of piles is $5.00 each, but as this was intended to cover the omission of a small number of piles should the same be necessary, it is not considered an adequate price when all are to be omitted, and this should not be considered a basis by the contractor for his proposal.

Respectfully,

J. K. TAYLOR,
Supervising Architect.

U. S. Engineer Office, San Juan, P. R., April 29, 1911. Received.
R.

224 EXHIBIT No. 52 FOR DEF'T, 891.

Copy.

U. S. Engineer Office, San Juan, P. R., May 27, 1911. Received.

San Juan, P. R., P. O.

J. A. P. L.

TREASURY DEPARTMENT,
OFFICE OF SUPERVISING ARCHITECT,
WASHINGTON, May 17, 1911.

Superintendent of Construction, Post Office Building, San Juan, P. R.

SIR: As it appeared from statements made by you, and reports on tests made, that the subsoil is sufficient to safely carry the building in your charge without piles, a proposal for their omission was obtained from the P. J. Carlin Construction Co., and on May 15th the following telegram was sent them, a copy of which has been mailed to you:

"Your proposal May thirteenth, accepted to deduct five thousand four hundred seventy-eight dollars, your contract San Juan Post Office, for omission piling. Should changes in foundation be necessary hereafter they will be settled upon contract unit rates."

Today the following dispatch was sent you, which is hereby confirmed:

225 "Department has accepted Carlin Company's proposal to omit all piles. Order pier footings carried to depths required, and forward drawing showing work as actually installed. Letter."

(This telegram was not received—Stierle.)

Upon receipt of the drawing showing the work as installed this office will be in position to take up the question of settlement with the contractors for the extra work upon the basis of the contract unit rates.

Respectfully,

J. K. TAYLOR,
Supervising Architect.

J. S. S.

226 EXHIBIT No. 53 FOR DEF'T, 891.

Copy of Cablegram.

SAN JUAN, PORTO RICO, March 20, 1912.

Supervising Architect, Treasury, Washington, D. C.:

Examination San Juan foundations slow, will complete this week. Can reach good soil one to three feet below present footings north

wall and columns. Believe all walls can be underpinned. Possibly some interior footings must be rebuilt but this not difficult. No notice to sureties possible until examination completed. Carlin's statement to you regarding arbitrary changes in footing by Stierle's orders confirmed by Stierle. Office has no ground for action against contractors and must probably assume responsibility for changes and necessary extensive repairs. Not possible to complete plans until conference in Washington. Expect to sail twenty-seventh. Letter.

HEALD.

O. B. Gov't rate. Collect.

227 EXHIBIT No. 54 FOR DEF'T, 891.

Copy.

SAN JUAN, PORTO RICO, March 20, 1912.

Supervising Architect, Treasury Department, Washington, D. C.

SIR: The following cablegram sent you today is hereby confirmed, which confirmation will be mailed you on today's steamer:

"Examination San Juan foundations slow, will complete this week. Can reach good soil one to three feet below present footings north wall and columns. Believe all walls can be underpinned. Possibly some interior footings must be rebuilt, but this not difficult. No notice to sureties possible until examination completed. Carlin's statements to you regarding arbitrary changes in footings by Stierle's orders confirmed by Stierle. Office has no ground for action against contractors and must probably assume responsibility for changes and necessary extensive repairs. Not possible to complete plans until conference in Washington. Expect to sail twenty-seventh. Letter."

As above stated, the excavation for examination has been necessarily slow, both on account of the difficult conditions of excavating and shoring, and also on account of the inefficient native labor. No attempt has been made at continuous trenching in any particular locality, nor is it believed that such trenching will be necessary. From pits thus far dug the following conclusions are considered to be conservative.

The south wall is on the original beach sand which affords a secure foundation.

228 The east walls are on an old sand fill and gradually step up towards the north at an increasing height above the original beach.

The east portions of the north walls and the column footings east of the axis line are on varying kinds of old fill, none of which is satisfactory.

No excavation has been made as yet with reference to west walls, but it is believed that these walls as well as the columns in the north-west portion of the building are on satisfactory foundation.

A number of columns in the central and northwestern portions of the building has as yet not been examined.

It is believed from the above described examinations that it will not be necessary to remove any main walls, as same can be underpinned to safe bottom by ordinary methods. It is likely that some interior column footings must be removed and rebuilt at a lower depth. However, as the field connections of the steel work are bolted and as but little masonry is in place over the columns this removal will be a comparatively simple matter.

The above conclusions are general and may have to be considerably revised, but are sent you today in order to convey to you an idea of the situation, which I do not consider to be as serious as was feared when my letter of instructions was written

Regarding the responsibility for the deviations from the contract requirements, and therefore for the necessary expensive reconstruction work, there seems to be no doubt that former Superintendent Stierle took upon himself to arbitrarily redesign the foundations without attempting to make any calculations to justify such
229 reconstruction. Mr. Berryman and I had a long talk with Mr. Stierle the day after my arrival, and of course several days before Mr. Carlin's arrival, in which confirmation Mr. Stierle confirmed the statements Mr. Carlin made to me, and presumably to you, in regard to Mr. Stierle's interference. From all that I have seen and heard from various sources I have but little confidence in Mr. Stierle's capacity or judgment, and have no hesitation in underpinning foundations which he originally pronounced to be perfectly safe.

His orders appear to have been so positive that the contractors would have had difficulty in doing the work as called for — the plans, and while I have no doubt that in some cases the work has been placed on ground inferior to what he believed to be the case, and that the contractors have profited in some cases by his slip-shod way of doing the work, there is no place to draw a line where his responsibility ends and the contractors' begins.

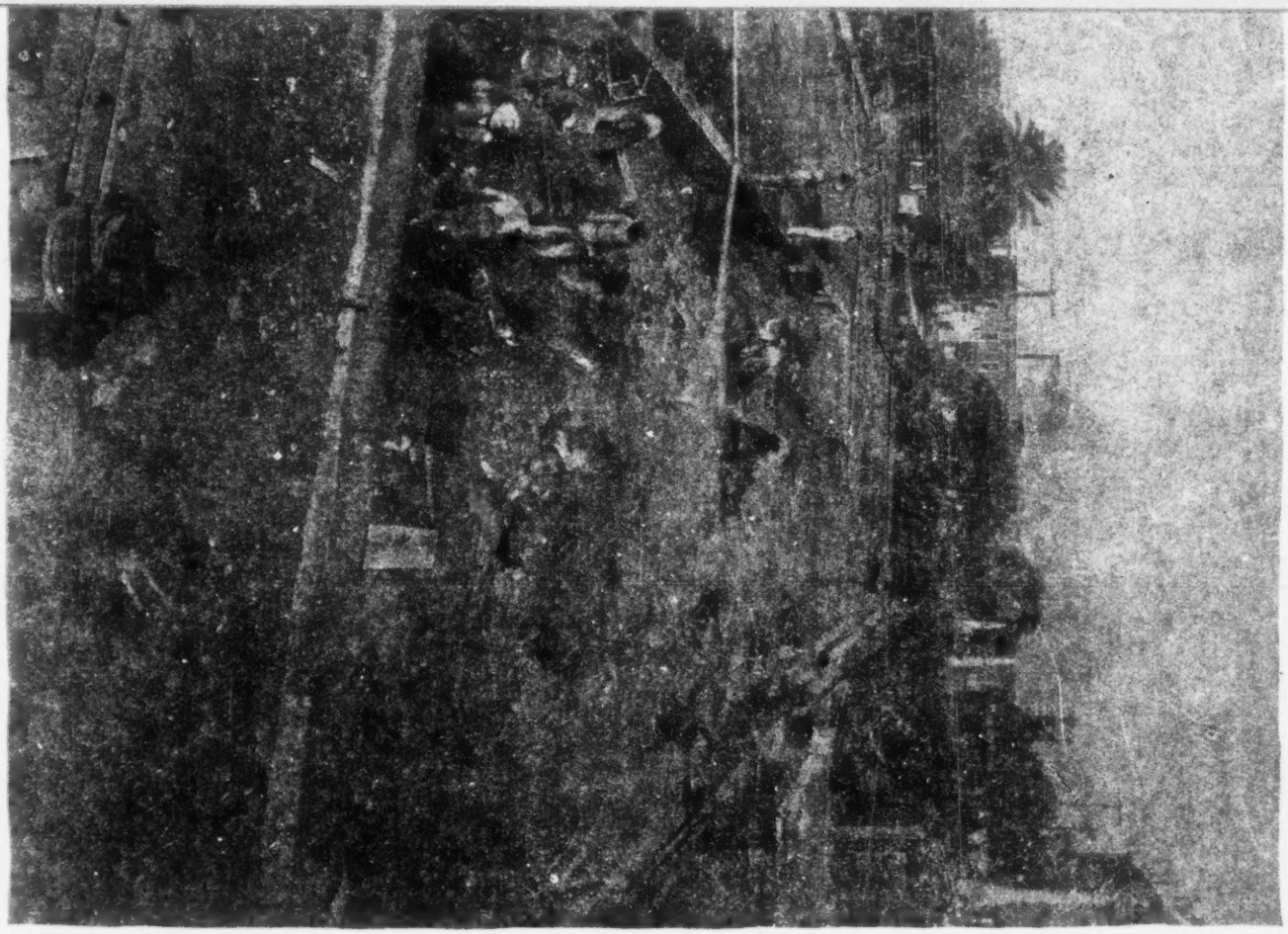
This report is not conclusive in any way, and is intended only for your information. The whole case, however, appears to bear considerable resemblance to the recent unfortunate occurrence at Plattsmouth, Nebraska, in that it is simply a case of having the wrong man in charge of work for which he appears to be entirely unfitted. As stated in my cablegram, there appears to be but little doubt that the moral responsibility for the changes and for the expensive reconstruction necessary on account of the changes is largely, if not entirely, with the Office through Mr. Stierle.

Further reports will be made as soon as possible.

Respectfully,

(Signed) E. F. HEALD,
Structural Engineer.

JULY. 28. 191



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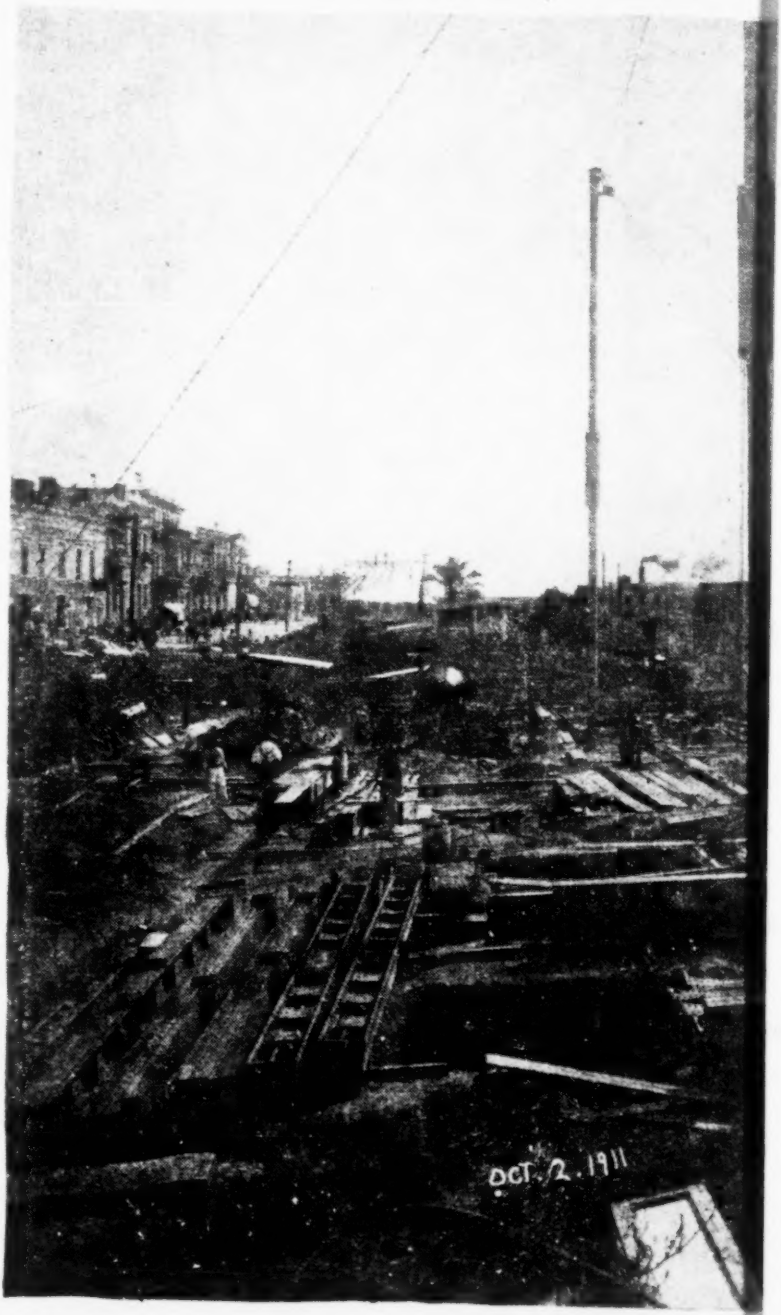
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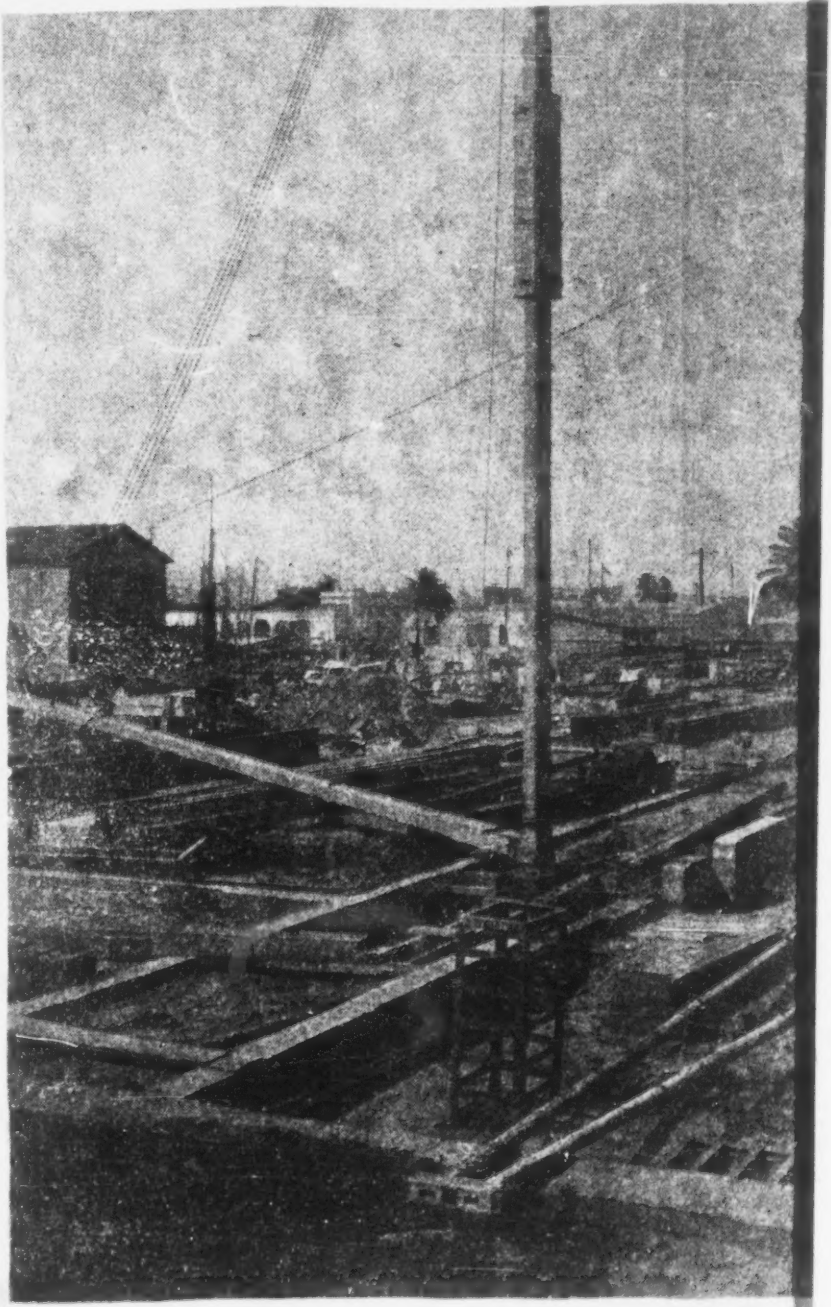

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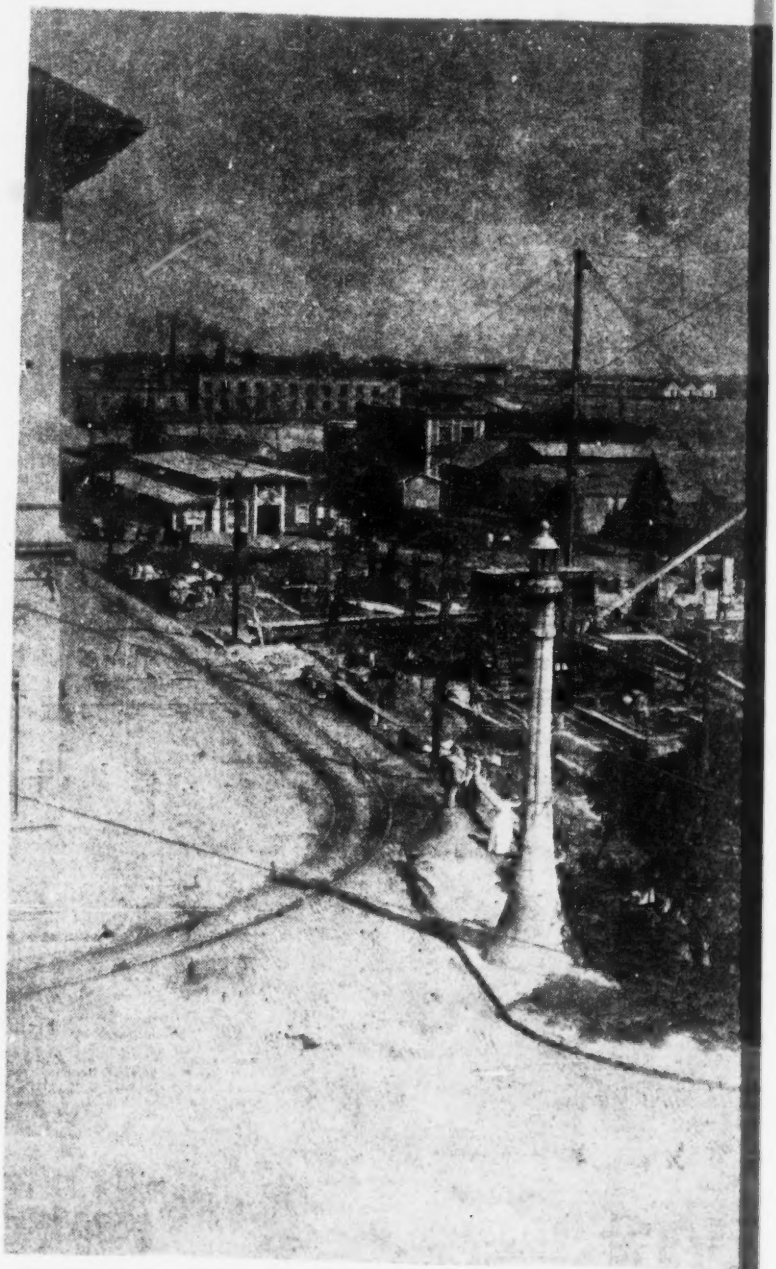

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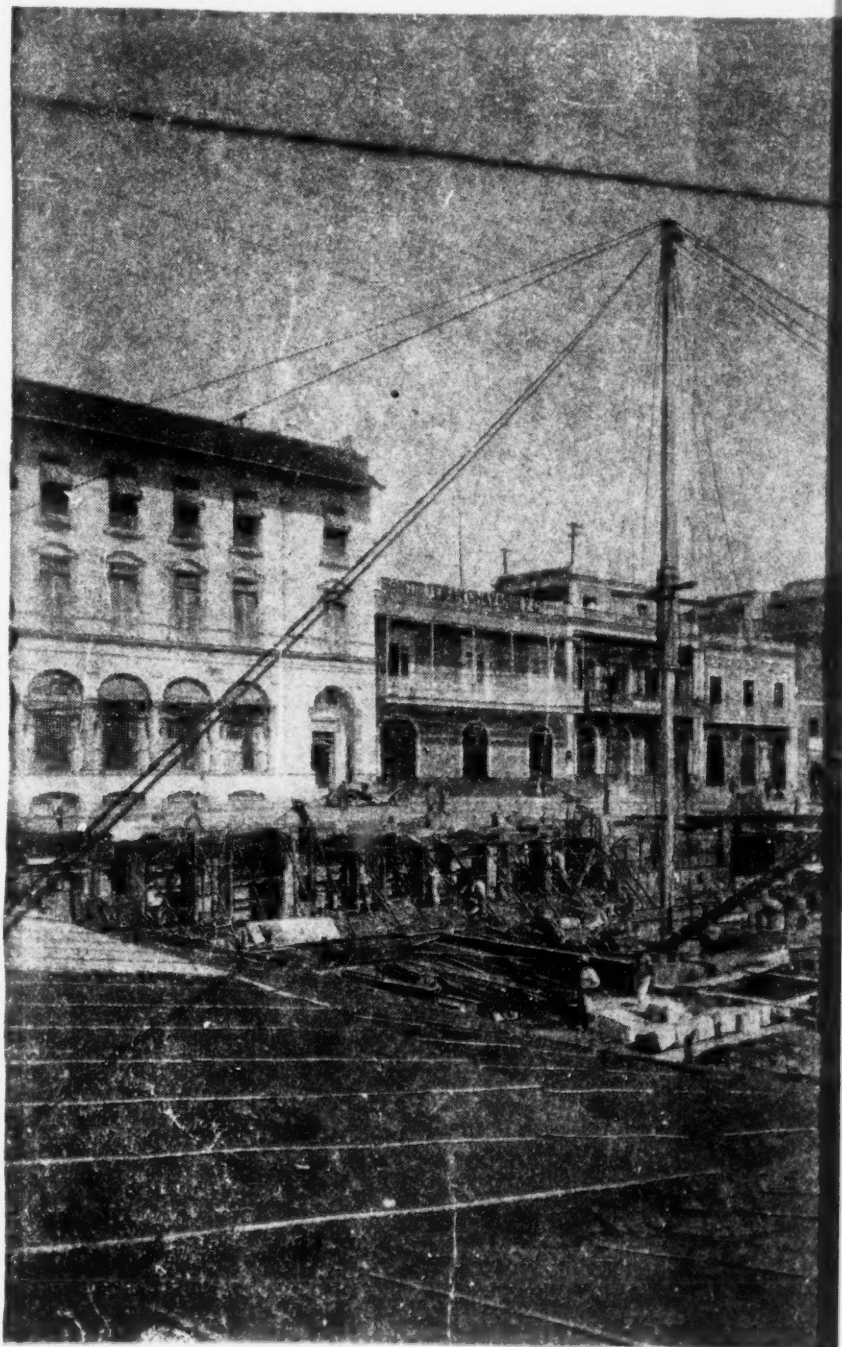

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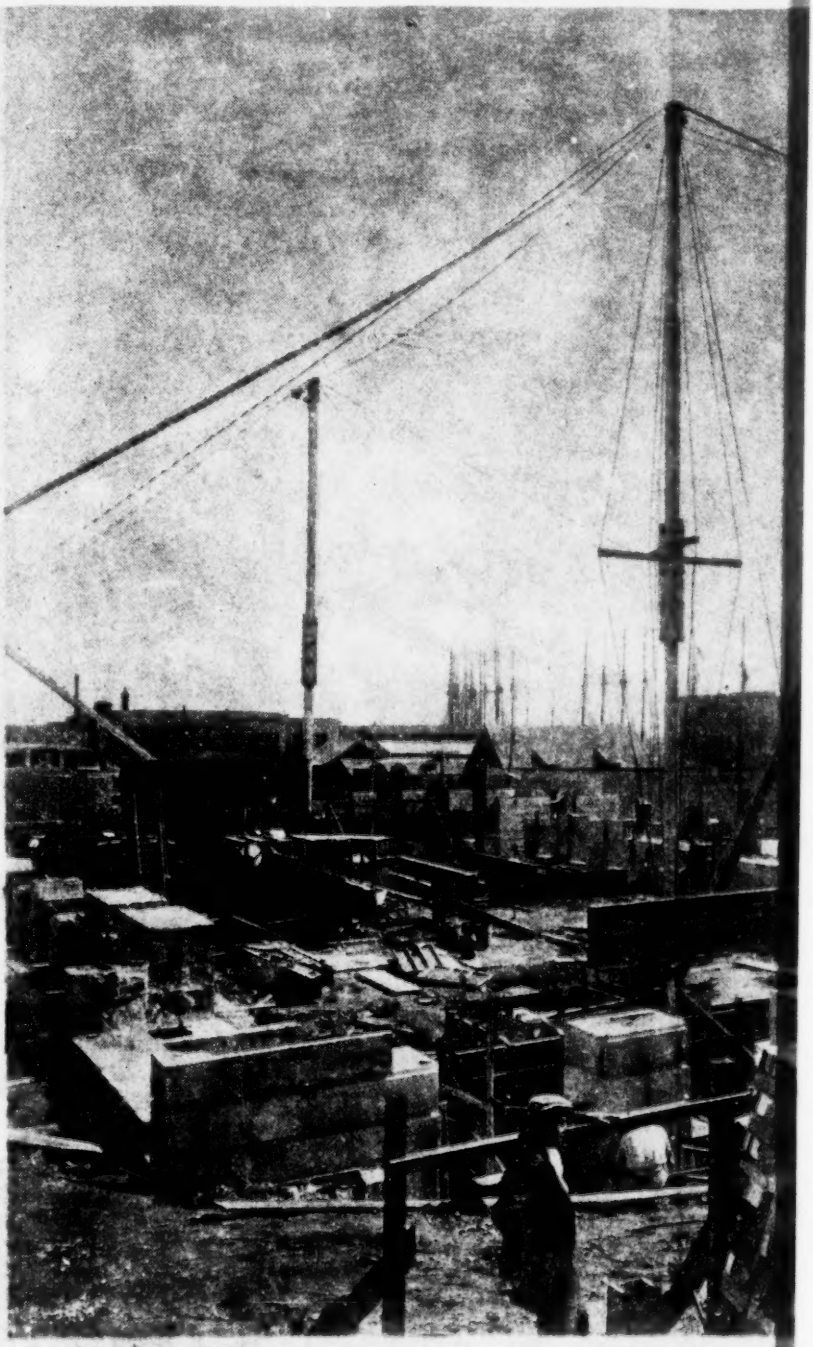

End of year
1911

230 EXHIBIT No. 55 FOR DEF'T, 891.

Copy.

West India & Panama Telegraph Company, Limited.

From Bailey.

March 23, 1912.

To Engineer Heald, care Superintendent Berryman, New Post Office, San Juna, P. R.:

Replying your cables twentieth and twenty-third prepare drawings and specifications for making foundations Post Office San Juan Porto Rico safe obtain proposals from Carlin and Company with distinct understanding that acceptance is subject to subsequent settlement of responsibility cable amount with recommendation and sufficient data to full understanding and await further instructions.

Washington.

Govt. Cables.

231 EXHIBIT No. 56 FOR DEF'T, 891.

Copy.

SAN JUAN, P. R., March 29, 1912.

Supervising Architect, Treasury, Washington:

Subject to conditions named in your cable twenty-third Carlin proposes to reconstruct foundations San Juan Post Office for cost plus ten per cent, guaranteed cost to Government not to exceed twenty thousand dollars. Carlin disclaims responsibility for changes, or for settlement resulting therefrom. On account uncertainties of work, proposal is favorable, recommend acceptance.

Work includes underpinning both north walls, east main wall, and west loggia wall; reinforcing south wall footing; and rebuilding or reinforcing nearly all column footings. Disregard previous statements of extent of necessary work. Have allowed Carlin to commence excavation.

Have engaged passage third, request instructions by first is possible.

HEALD.

Official business, Government rates, Collect.

232 EXHIBIT No. 57 FOR DEF'T, 891.

Copy.

SAN JUAN, P. R., April 13, 1912.

Supervising Architect, Treasury, Washington:

Borings show layer sand from one to four feet thick, soft black muck four to eight feet thick underlies sand then coral rock throughout building. Letter. SUPT. BERRYMAN.

For rate collect.

(Here follow photographs marked pages 233, 234, 235, 236, 237, 238, and 239.)

240 EXHIBIT No. 65 FOR DEF'T, 891.

Copy.

Purdy & Henderson, Inc., San Juan, P. R.

No. 2 re Carlin Federal Building Tender.

July 24, 1912.

Messrs. P. J. Carlin Construction Co., 16 E. 23rd Street, New York City.

GENTLEMEN: We reply to your letter of the 28th inst., re subcontract of concrete work on the Federal Building—of which you are the general contractors. We note that you say, that the Guerini Stone Company have abandoned their contract, and that you may sublet the concrete work, and ask us for a tender.

We propose to excavate the concrete work as described below for the sum of One Hundred and Four Thousand, Two Hundred and Fifty Dollars ($104,250.00) furnishing the necessary labor and materials, except the reinforcing steel which you will furnish delivered at the building, and we will bend and place.

This estimate includes (1) all the reinforced concrete floor and roof slabs and fire proofing of structural steel, the interior concrete walls from the level of the first floor (level of top course of
241 granite) up, and the reinforced concrete stair construction, all as indicated on the Architect's plans, which you submitted to us; (2) all the exterior concrete walls whose exterior surface "shall be in texture similar to sandstone", but similarly to the exterior walls of the Royal Bank of Canada Building here of concrete stones cast by the wet process in sand moulds. (We offer this Bank Building work as a sample of the work and will submit a sample stone if desired); (3) all the concrete walks and drivers and concrete curbing indicated on the approach plans.

We believe the building superintendent would be quite satisfied with the exterior work, such as we have done on the Bank, and we could assure you excellent results. We could either point the stone joints as on the Bank work, or "kill" the joints, so that they are not visible as we are doing on the Y. M. C. A. Building using similar stone in conjunction with plastered surfaces. However, should you require that these walls be cast in place, we could do the same at an additional price of $13,200.00, "killing" the joints the same as we propose for the stone process, and casting stones and placing for cornices and moulded work. The cast stone, we could make and set in sizes up to two tons weight if required.

We would require payments monthly on statements furnished by us of work completed up to the 1st of each month, payments to be made by the 15th day of that month, at a rate fixed by proportioning in cubic meters the work done, and discounting 10% till final payment, payments to be based on the following prices:

242 (1) floor slabs, fireproofiing steel, of interior walls and stairs..... $31,050.00
(2) exterior wall concrete..... 66,300.00
(3) walks, drives and curbing..... 6,900.00

$104,250.00

We would require two weeks' notice to commence work at the start, and should the progress of our work be hindered at any time sufficient to necessitate us to reduce our force or output more than 50%, it will be considered cause for withdrawing our men and plant until this work may proceed with full force when a three months' notice would be required, and time delay allowed.

We have the organization ready to commence work any day, but to provide for the economic handling of our force which we expect to place on other work we make this tender subject to withdrawal two weeks from date, when we would submit a revised tender.

Hoping to be awarded the contract for the work, we are,

Yours respectfully, —— ——

243 U. S. Post Office and Court House, San Juan, P. R.

Payments on Work Performed by Guerini Stone Company.

Voucher.	Granite Setting.			Conc. Walls.		
11/ 2/11.	973′ @ 40¢	389.20		1,385.4′ @ 1.07	1,482.38	
	—10%	38.92			148.23	
			350.28			1,334.15
12/ 6/11.	495′ @ 40¢	198.00		8,240′ @ 1.07	8,816.80	
	—10%	19.80			881.68	
			178.20			7,935.12
1/ 2/12.	1,002′ @ 40¢	400.80		3,920′ @ 1.07	4,194.40	
	—10%	40.08			419.44	
			360.74			3,774.96
1/31/12.	3,173′ @ 40¢	1,269.20		10,143′ @ 35¢	3,550.25	
	—10%	126.92			255.03	
			1,142.28			3,195.22
Totals			$2,031.50			$16,239.45
				Less 1,543′ done by Carlin @ 1.07		1,851.01
						$14,388.44

Recapitulation.

Granite setting.....	$2,031.50
Conc. walls.....	14,388.44
	$16,419.94

March 2, 1912.

58.69 cu. ft. Granite @ 40¢.....	23.84	958.57′ @ 35¢.....	355.50
—10%	2.38	—10%	33.55
	21.46		301.95

Grand total up to March 9, 1912.

Granite	$2,052.96
Concrete	14,690.39
	$16,743.35

244 *Carlin's Estimate of Guerini Work to Artificial Stone Level (Based on Carlin Estimated Quantities and Guerini Contract Units).*

Total amt. of sq. ft. of granite set:

3547'@40¢		$1,428.80
Less amount for cleaning and pointing:		
3547'@10¢		354.70
		$1,074.10
Total amt. of concrete:		
23,184'@25¢ ($6.70 yd.)	$5,796.00	
Deduct for surfacing:		
23,184'@5¢	1,159.20	
		4,636.80
		$6,710.90
Less 15%		856.64
		$4,854.26
Charges against G. S. Co.	$2,469.88	
Cash paid G. S. Co.	4,439.55	
		$6,909.43
Overpaid		$2,064.43

245 Guerini's application for payment:

1st by Follett, Dec. 30, 1911, from S. J. not itemized	$5,654.00
by Boston, Jan. 16, 1912, not itemized	10,000.00
by Boston, Jan. 17, 1912, " "	12,750.00
by Boston, Jan. 26, 1912, Itemized	9,012.00

Paid by P. J. C. Const. Co. Feb. 2, 1912:

Application, 343 cu. yds. Cone. @ $10.00	$3,430.00	
2,500 sq. ft. granite set @ 40¢	1,000.00	
	4,430.00	
Less 15%	664.50	
		$3,765.50

It will be noted this is 10¢ per ft. above G. S. Contract price.

Feb. 24, Boston asking for $9,000.00

March 9, 1912, Boston gives quantities:

573 cu. yds. Conc. @ $6.70	$3,839.10	
3,460 sq. ft. granite set @ 40¢	1,384.00	
	5,223.10	
Less 15%	783.55	
	4,439.55	
Less previous payments	3,765.50	
		674.05
		$4,439.55

Mr. P. J. C. applied G. S. Co. units.

246 EXHIBIT No. 68 FOR DEF'T, 891.

Copy.

88 BROAD ST., BOSTON, MASS., January 27, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your favor of the 24th inst. is received. We note that you are still waiting for monthly estimate of quantities formed by us under sub-contract for San Juan, P. R. Have you instructed your representative to send your quantities? Our Mr. Lootz agreed with him as to work done up to Dec. 30th. There are about 3,500 cubic yards of concrete in our job and this will give an average price of $18.50 per cubic yard for the concrete in place.

We have already put over $20,000.00 into this job, due very largely to your delay in getting work and materials ready for us. Up to the present date we have not received a cent of money from you and if you think it is a hardship for you to have $35,000.00 worth of material on the job, as we understood you to say to our Mr. Converse, we wonder what you would think if you were sub-contractor and had to spend over $20,000.00 without any payments on account.

We must insist on being given fair consideration in the handling and progress of this job. In this connection, we would call to your mind the situation regarding the stone work which we have been setting and which must be set before we can do our exterior concrete work.

247 By noon of January 15, 1912, the stone was delivered from the Steamer "Luckenback" which was supposed to finish and include the J course around the main building. No approach stones or sills.

During three weeks preceding this date, the stone on the job could not be set continuously. This necessitated moving the men to a different part of the wall almost after setting each stone and greatly added to the expense of setting. Notwithstanding this fact, the work has continued and all stone which could be set, was set before the arrival of the "Luckenback."

Our Mr. Lootz has got things working smoothly and anything that your local representative desires to bring to our attention, please have him notify our Mr. Follett.

Our Mr. Converse will be going down in the course of a few weeks and if there are any special messages which you wish taken down or any special part of the work which you wish taken up, please notify us, so that Mr. Converse can look after it. It is quite possible Mr. Converse may be in New York next Wednesday, or sometime next week and he will call upon you.

Yours truly,

GUERINI STONE COMPANY.

H. P. C./S.

248 At this point defendant rested its case.

Thereupon, plaintiff further to maintain the issues in the case offered in evidence the following letter which had been previously identified, dated December 18th, 1911, and there being no objection, it was duly received in evidence and marked Exhibit 44 for the plaintiff.

EXHIBIT 44 FOR P'T'FF, #891.

J-2397.

Dec. 18, 1911.

P. J. Carlin Const. Co., New York, N. Y.

GENTLEMEN: Your letter of the 14th inst. is received. Regarding granite, it is all set, except such scattering pieces as would be in some cases, impossible to set owing to lack of other pieces of granite or in the case of a few pieces only one stone could be set here and another there, scattered all over the building.

We have a copy of photograph taken previous to Dec. 1st showing granite set and the 500 cubic feet you mention as set, in no way approximates what this photograph shows to be set.

We are being delayed by the non-delivery of the granite and anything you can do to hasten delivery will save considerable expense to us.

We have not been able to proceed with the main portion of our concrete work, owing to your delay in preparing your work for us.

249 We have sent our Mr. Lootz to take charge of the San Juan job and hope your Mr. J. J. Carlin will find him an agreeable coworker. Mr. Lootz graduated from the Mass. Inst. of Tech. in 1898 and has been engaged on outside construction ever since.

Yours truly,

GUERINI STONE COMPANY.

H. P. C.—S.

Thereupon plaintiff further to maintain the issues in the case offered in evidence the following letter which had been previously

identified, dated March 8th, 1912, and there being no objection it was duly received in evidence and Marked Exhibit 45 for the plaintiff;

EXHIBIT 45 FOR PLAINTIFF (891).

Ref. Foundations.

San Juan, P. O. & Ct. H.

SAN JUAN., P. R., March 8, 1912.

The Supervising Architect, Treasury Department, Washington, D. C.

SIR: As the completion of the necessary test pits was not made until just before the steamer sailed on the 6th instant, I was unable to submit any detailed information in reference to cable for-
250 warded that day, therefore the following is submitted as an explanation of my request that the work be suspended until a complete examination is made of all foundation work installed.

I have been very desirous of being able to permit the work to proceed without any material changes or delay, and my decision to ask that the work be suspended was arrived at after having as thoroughly as possible according to directions, made the several examinations reported, and have now come to a positive opinion that if something very radical is not done at this time the office will undoubtedly have cause to regret it later.

The crack in north log-ia and area wall opposite, was first noticed on the 27th ultimo (although it could have existed before that as this particular place was partially covered with debris,) and has increased since its discovery. The crack in the log-ia wall occurs below an opening and has caused a joint of the granite arch above to open. This crack is undoubtedly caused by the foundations having been placed on an old Spanish wall but it indicates that some settlement has occurred with a very little load and also shows that the foundation on the north side which was considered good is treacherous. The foundation wall for buttress at Tanca St. entrance shows a small crack also and this was noticed immediately upon my arrival but I did not report it as I was of the opinion; at that time, that it was caused by contraction between the old and new work; the buttress wall having been poured before the building wall and no slip joint having been made. As this crack has increased
251 recently it shows that there is a settlement taking place on this east log-ia wall also.

I have been advised by one who is in a position to know that the soil throughout the island is very unreliable and not only deceptive but treacherous and it is a fact that the Insular people those in charge of the school buildings etc., are having trouble in this respect.

I believe it is very necessary that all foundation work should be examined and it seems that as the examinations made show that

the work has not been installed as required that the contractor could be demanded to uncover all work installed for inspection. He should then be requested to state what he proposes to do to obtain satisfactory results, and if he does not comply with this demand then directions could be given as to how the necessary work should be done. The contractor states repeatedly that all work was done as required by the late Superintendent, even to omissions, but a copy of a letter from that official to the contractors disapproves of that claim as he stated in effect that all foundations should go to the bottom of old fill.

Respectfully,
(Signed) G. R. BERRYMAN,
Sup't of Construction.

252 Thereupon plaintiff further to maintain the issues upon its part recalled and reproduced the witness GEORGE A. FOLLETT, who testified as follows:

Direct examination by Mr. PAINE:

In the latter part of July some of the foundation walls were in and some were not finished. They were working there at the time and we could not start our work because we would have to have derrick equipment and derricks were not erected until the first two weeks of September. The derricks the Carlin Construction Company sent down here were not the proper type and had to be changed by Mr. Oaksmith of the Carlin Construction Company when he got here. Our understanding of the contract is that the defendant had to furnish these derricks set up. After they were put up and whenever they were offered to us we were on hand with men to go ahead. Both derricks could not be used at the same time until the second motor equipment came, about the 25th of December. At that time we had a force of men to take care of all the work the derricks could do. Along the latter part of December and January, we had a good many letters of complaint from the Carlins, but on investigation they were unjustified, and about the end of
253 January it got to be a little monotonous, and I began replying to these letters, explaining that we could not go ahead, and calling their attention to some of their neglect or slowness, and they stopped writing these letters. As for the concrete which has been mentioned on the North wall on the under side of the granite where concrete was to be put instead of granite because it did not show there were only about four or five days of concrete. If we had done it in July we would have had to stop from July to October, when the granite arrived.

Thereupon, plaintiff further to maintain the issues upon its part recalled and reproduced the witness H. P. CONVERSE, who testified as follows:

Direct examination by Mr. PAINE:

The substance of my conversation with Mr. Carlin and his father in New York in January 1911 was that we were to get on the job

in Porto Rico and start work in Porto Rico. With regard to the 25th clause of the contract, applying to the concrete footings up to the basement floor at the rate of $6.70 a cubic yard, this was a supplementary figure which might have been accepted by the general contractor for that work. That work is for concrete footings and is absolutely different from the work which we did. When I was here I saw them chucking the concrete into the trenches without any forms whatever. Our concrete work being above ground, called for forms which are a large part of the expense of concrete construction requiring as they do carpenters to build them, lumber, etc.

The price of $6.70 has nothing whatever to do with
254 our part of the work. Referring to my interview with Mr. Carlin in New York when we agreed on the schedule of payment, they had side stepped on payments just as long as we thought we could stand it, and I went to New York on February 2nd and insisted on payment to us for the work done. At that time we received a cheque for some $3,700.00 for the work done up to the end of December, and based on our December application for payment. This was on February 2nd. No money had been paid to us previous to that time, although the contract calls for monthly payments of 85%. We insisted on our money and were given that cheque, and we insisted on a settlement as to units, so that the money would come to us thereafter in a mutually satisfactory way, at definite intervals, in accordance with the contract, and it was agreed that we were to make our applications and have our payments on the basis of this schedule. He called his stenographer into his private office where I was sitting beside his desk and he told him to copy off these three items. The understanding was that this was our agreement of what we were to be paid. I subsequently wrote to Mr. Carlin from Boston enclosing an application for payment, and stating that it was made in accordance with that schedule and they never replied objecting to it. On February 2nd, 1912, I wrote to Mr. Follett in San Juan, and notified him that the work was to be paid for on the basis of this understanding. I also wrote the Carlin Company taking the same position, and there was no denial from them. At the time we were making these demands for payment they never made any claims for

deductions, except for certain sand and stone, or as they
255 called it "small charges." This is the first time I have heard of a charge of $3,000.00, or any of the charges that Mr. Carlin testified to.

The said parties having concluded and submitted their testimony in the several matters aforesaid, and having by their respective counsel stated that they had no more testimony to offer, each rested his case, and the foregoing constituted all the evidence given in said cause.

And the said parties having concluded and submitted their testimony in the several matters aforesaid, and having by their respective counsel submitted arguments to the jury, the said Judge before said jury retired to consider of their verdict, did then and there of his own motion charge and instruct the jury as follows:

The Court's Instructions to the Jury.

GENTLEMEN OF THE JURY: On account of the fact that the able and exhaustive remarks of counsel are not preserved and do not become a part of the record in this case, while my charge necessarily does, I shall feel compelled to, in the shortest possible way, make a résumé of the facts, and then, as counsel said, confine myself to the big things, or, as was very aptly said for the first time in my hearing, confine myself to the mountain tops which emerge from clouds.

This was a contract entered into between the parties here on the 16th day of December, 1910, as a sub-contract to a general contract which had been entered into between the defendant and the general government of the United States, through its agents, upon
256 the 10th day of December, 1910, looking toward the construction of a Federal Post Office and Court House at the City of San Juan, Porto Rico.

Soon after the execution of the contract between the parties here, and early in January, 1911, the sub-contractor, the plaintiff company, was notified by the defendant, the general contractor, to proceed to Porto Rico and to begin the work which they had engaged to do under their sub-contract. On the 16th day of January, 1911, a representative of the plaintiff company arrived in Porto Rico with a few men for the prosecution of the work contemplated by the contract. At about the same time in January, it was deemed advisable by the Supervising Inspector of the office of the Supervising Architect of the United States, who was in immediate charge and supervision for the United States, to cause certain changes in the foundation plans for the contemplated building to be made in advance of any work. This was laid before the general contractor and acceded to by him, although it involved a change in the plans upon which he had accepted his contract. Such change was then approved by the office of the Supervising Architect of the United States, and the change was begun to be made in the manner which has been detailed before you, but which is not material. At any rate, contemporaneously, the representative of the plaintiff company began the work here of establishing itself, of fitting up a shop for the making of the molds and forms necessary in the prosecution of this work, and proceeded with that with a very few men, and with those men skilled only in the making of molds and forms, as was also the representative of the plaintiff company at San Juan.
257 The foundation as contemplated by the change was completed, as I remember it, at the end of July or the beginning of August, 1911, and counsel will correct me if I am wrong. Upon August 5th, the plaintiff company was notified by the defendant to begin its work under the sub-contract. In the meantime, an option of that sub-contract having been exercised, the plaintiff company was directed, as therein provided, to proceed with the setting of the granite, as well as the mixing and pouring of the concrete. At that time there were on the ground, derricks and gin poles which were not in the form the derricks subsequently assumed, but shortly

after August 5th, on August 25, 1911, Mr. Oaksmith, a representative of the defendant company, came here to be its superintendent, and he immediately went to work putting up and installing the derricks which are now in operation on the work. They were ready the first week in September. On October 16, 1911, the granite and concrete work was begun by the plaintiff company. On December 21, 1911, skilled men were brought down by the plaintiff company, not only for the prosecution of the molding and preparing of the concrete for the walls, but also for setting granite.

Payments were made by the defendant company to the plaintiff company for work done during the months of October, November and December, and in the meantime, controversy was taking place between them as to the basis upon which such payments should be made. They had never reached an agreement, and never did reach an agreement, as to either the basis or the units which should
258 be used in making the settlements between them.

On February 12th, the granite setting stopped by an agreement between the parties, the plaintiff company being relieved from any further setting of granite, and the defendant undertaking to do so itself.

Meanwhile, a new supervising inspector of the Government having coming on the works, and the walls as erected showing signs of giving way and of change, he was prosecuting further investigation as to the character of the underlying subsoil immediately beneath the building, and became convinced from such examination that it was unsafe to permit any further additions to the weight of the structure, without a radical change in the plans, suggesting that all piers should be of concrete or of masonry, and that they should go through the treacherous material to rock at all points. That was approved by the office of the Supervising Architect at Washington.

On March 9th, the general contractor was notified, and immediately notified the sub-contractor, to stop all work on the said building until the foundation had been made safe.

In the meantime, the controversy as to unit and basis of payment was going on between the plaintiff and the defendant, and upon May 22nd the plaintiff notified the defendant that it elected to rescind or terminate the contract on two grounds; one being delays in furnishing labor and material, and the other being failure to make monthly payments as provided in the contract.

Those then are the two mountain peaks which you will
259 have to consider, and about which radiate and attach themselves, all the material facts that have been shown during the course of this long trial.

One of the provisions of the general contract, which, among all other provisions was read into the sub-contract, was one permitting the Government, at its option, at any time, to stop work on the Building. Of course, that would scarcely justify its stopping it for an unmeritorious or unimportant cause, but here the whole safety of the structure, upon which a large sum of money was to be expended, was dependent upon the stability of its sub-structure, and there is no allegation, nor was there any testimony that the work of

underpinning this building in a safe way was proceeded with in any wrong manner, or with any unnecessary delay.

I instruct you that even if there was delay in furnishing granite, there could have been no liability under the sub-contract for such delay, in money, but such a condition was to be remedied by an extension of time for completion, as therein provided. Defendant could not have permitted the work to go on until those footings were made secure, even if it so desired. The Government, under its option, would have stopped the work. However, notice was given to plaintiff on August 5, 1911, to start setting granite, derricks were up by the first week in September, and work was started on October 16th. It is for you to decide who was at fault for that delay.

You are also to decide whether the derricks that were on the ground prior to the first week in September, breast der-
260 ricks and gins, could have been used in carrying out any of the obligations imposed upon the plaintiff company by the contract, at a date prior to the first week in September, or whether they could have been sufficiently and profitably occupied during the early period of July while the underpinning was being made secure and until the derricks were completed as they now exist, in making molds and forms which would be necessary for the use and quick completion of the work.

The testimony shows, uncontradicted, that it had on the ground but one or two men, skilled, and only slightly skilled, in the setting of masonry, from the time it first landed on the Island until December 21, 1911, when quite a number of men, some of them skilled masons and others skilled in other parts of the work contemplated by the contract, arrived.

Simultaneously with their coming, a second engine was attached to one of the derricks, and thereafter, with the aid of a second engine and skilled men, the work proceeded rapidly and satisfactorily until, on February 12, 1912, the plaintiff company and the defendant agreed that they should be relieved from any further setting of granite, and the concrete in the interior of the building covered by the said contract was substantially completed.

I instruct you that no delay caused by the action of the Government for the purposes which I have detailed, under the provisions of the general contract which were read into the sub-contract, including the right to stop work, must be considered by you.
261 You are only to consider the delays, if any, which were caused by the failure of the general contractor to furnish suitable labor and material on the work, as contemplated in the sub-contract.

There is no equity to be considered here. This is an action at law, and under a contract between the parties, which it is for you to consider and to determine as to its provisions, under the instructions of the Court. But the parties have made their own contract, and, under an authority which I shall read you later, neither the Court nor the jury will make a new contract for them.

It was held by the Supreme Court of the United States in the case of Norrington v. Wright, 115 U. S. 206 and 207, the leading case on

the subject in the United States, and following the old English case of Hoare v. Rennis, 5 H. and N. 19, both of which were cases calling for the delivery of materials purchased by one person from another in monthly installments, that where the parties have made an agreement for themselves, the Court ought not to make another for them. In neither of those cases was the basis or unit, as in this case, in controversy. It was merely a rescission in each for an alleged breach of a contract by the other party for a failure to deliver proper amounts monthly, but there was no discussion between them as to what those amounts should be under the contract, either of the commodity delivered or of the basis upon which the payment should rest. Therefore, while the case is a great case, it differs so radically as to its controlling facts, as did the English case, from those
262 under consideration, that it is not an authority which is either conclusive or controlling upon me. The fact that the defendant had been paid by a former Supervising Inspector at one unit rate, which, when the second Inspecter came, was held and declared by him to be incorrect—and an acknowledgment has been made by the defendant that on account of it he is in debt to the Government of the United States on that account in the sum of about eight thousand dollars—conferred no right upon the subcontractor to receive payment on any other basis or at any other unit rate than that which is provided for in the contract which he entered into.

There was testimony here as to the probable profits which the plaintiff company would have gotten if the contract had proceeded in the ordinary and usual manner of such contracts, but that was based on nothing, and makes you pass rapidly from the realm of guess to the realm of conjecture. Thousands of contingencies might happen in the meantime which might destroy any profit and perhaps cause a loss to the plaintiff company in carrying out its contract.

The case of Phillips, Etc. Construction Co. v. Seymour et al., 91 U. S. 652, where the plaintiff in error had contracted with others to build a large part of the Wisconsin Central Railway, and, as a part of the damages claimed for a breach of that contract, an attempt was made to show what the probable profits would have been, the Court holds on pages 652 and 653 that:

"The attempt was to show that, by the use of the road at
263 an earlier day, much profit would have resulted. But the witness stated that the road ran through a wild, uninhabited country; that he expected that saw-mills would have been established along the line of the road, and the transportation of lumber incident to the use of such mills would have made the defendant a profit of $20,000.

The whole basis of this calculation is conjectural, uncertain, and vague. It is manifestly no safe basis on which it can be assumed that any business would have been done in the few days of the delay; or that, if done, it would have been done at a profit. There was nothing on which a jury could have done anything but conjecture and speculate, at the hazard of sacrificing truth and justice.

There was, therefore, no error to defendant's prejudice in this part of the case.

It is said that the Court erred in admitting evidence on the part of plaintiffs of the profits they would have made on the remaining part of the road if defendant had paid, so that they could go on.

Whether the evidence which was given on this subject was admissible or not was rendered immaterial by the subsequent ruling of the judge, who instructed the jury to disregard it, and to allow plaintiffs nothing on the ground of such supposed profits; and it is manifest from the record that nothing was allowed for this in the verdict."

I so instruct you here.

264 It is evident that certain material and appliances, which were used by the plaintiff company in the carrying out of its contract, so far as it was carried out, are now, or were at one time placed in the custody and charge of the defendant company, and that the value of them was about three thousand dollars, although it was not entered into in detail. I don't know whether even a schedule of them was put in, was it?

Mr. PAINE: Yes, sir.

For that credit must be given in whatever decision you arrive at, to the plaintiff company, and in the uncontradicted sum of three thousand dollars.

Now as to the question of payments, I shall not go into that in detail. It would be too tedious, and I don't think it would be instructive. You have had the facts brought out from every different side and with every facet. You have the advantage of a resumé of the testimony for your guidance, much better than I could give it to you, either from my notes or my recollection or my calculation.

The fact that the defendant has received, or is receiving, or may receive, from the Government of the United States any sum on account of the building operation, is of no importance here. There is no controversy between the Government and the defendant company, so far as appears, with which the plaintiff company could have any concern whatever.

I now come to the instructions requested by the plaintiff.

The first instruction requested by the plaintiff is refused as drawn, because it has been covered by a modified oral instruc-

265 tion.

For the same reason, the second instruction is refused.

Mr. PAINE: I understand it is not necessary to take any exception.

THE COURT: No, I grant them in writing here.

The third instruction is granted, and is as follows:

"In estimating the recovery to which the plaintiff is entitled, if you find he is entitled to recover, you should consider the reasonable expenditures incurred. * * *"

No, I will modify that. I have just covered that by another instruction.

The fourth instruction is refused as drawn, and an exception granted.

The fifth instruction is granted as modified.

"You are instructed that a Supervising Engineer for the Government had no authority to order deviations from the specifications, unless duly authorized thereto by the Government, or unless such deviations were subsequently ratified by the Government, and that the defendant was bound to know of this rule of law."

But the deviations from the contract here were ordered and ratified by the Government.

The sixth instruction is refused as drawn, and an exception granted.

The seventh the same.

The eight- the same.

The ninth, as follows, is granted:

266 "If you find that the plaintiff has proved expenditures in the work under the contract, the burden of proof is on the defendant to show that they are unreasonable, otherwise they will be presumed to be reasonable and proper."

The tenth is granted.

"The clause of the sub-contract providing that if the defendant delays plaintiff, the plaintiff shall have an extension of time equivalent thereto, refers only to a reasonable delay."

It is for you to decide under the general instructions, whether this delay, under all the circumstances, was reasonable or unreasonable.

The eleventh is granted.

"The provision of the contract between the P. J. Carlin Construction Company and the Guerini Stone Company, covering extensions of time beyond the term stated in the contract to the sub-contractor, is not exclusive, and does not bar the sub-contractor from other remedies."

The twelfth is granted.

"All testimony and evidence on behalf of the plaintiff, which had been admitted without objection, must be considered to be material and within the allegations of the complaint, as amended; and all claims that such admitted testimony and evidence are immaterial and outside the allegations of the complaint must be disregarded."

The thirteenth instruction is granted as modified.

You are instructed that the fact that the owner of this building, and the party making the principal contract with the de-

267 fendants for its construction, was the United States Government, instead of an individual, makes no difference in the rights of these parties under their sub-contract, but plaintiff's rights are exactly the same as though no question of public property were involved."

However, as I have already instructed you, subject to all the provisions of the general contract.

The fourteenth is refused as drawn.

The fifteenth is refused as being against the evidence.

Instructions Asked by the Defendant.

The first is refused.

The second, as follows, is granted.

"The Court instructs the jury, as a matter of law, that the defendant is not liable to the plaintiff for any delay in the execution by it of either its original contract with the Government of the United States, or its sub-contract with the plaintiff, which results from the action of the Government of the United States, or its authorized representatives, therefore the Court instructs you that as to any or all delays which you may believe under the evidence resulted from the action of the representatives of the Government of the United States in changing the foundations or plans of the Federal Building in question, or otherwise, the defendant is not liable therefor, and the plaintiff connot recover."

The third instruction is refused as drawn, because it has, so far as it is applicable, already been covered by the instructions given.

268 The fourth instruction is granted as modified.

"The Court instructs the jury that, under the complaint and the law and evidence in this case, the only questions submitted for your consideration are:

First. If you believe that whatever delay may have occurred in connection with the execution of the contract between plaintiff and defendant resulted from the action of the Government of the United States, as above set forth, then you shall find for the defendant.

Second. If you should find under the evidence that there was delay in the execution of the contract, which was not caused by the Government of the United States, then you are instructed that the defendant is not liable for any such delay unless it resulted from its failure to provide labor and materials other than that provided in the sub-contract."

I should modify my former instruction as to that, because the wording is "labor and materials other than is provided in the sub-contract."

The fifth is granted as modified. Most of these have been covered by my former instructions.

"The Court instructs the jury that, if you believe from the evidence that the defendant was not guilty of any delay in providing labor and materials not included in the sub-contract, in such manner as not to delay the material progress of the work, then plaintiff was not justified in abandoning the contract with defendant, and consequently, under the terms and provisions of paragraph 5 of the sub-contract, the defendant has a right to retain until

269 the completion of the work, any sums of money which might at the time of such abandonment have been due to the plaintiff. Therefore, even if you find under the evidence, that at the time of such abandonment, there was any sum due or owing from the defendant to the plaintiff, the latter is not entitled to recover the same in this action."

The sixth instruction is refused.

The seventh is granted.

"The Court instructs the jury that, with respect to payments on account, the only subject of discussion between plaintiff and defendant is the application of the proper unit price for the labor and materials actually incorporated in the work: therefore, if you believe from the evidence that the payments made to plaintiff by the defendant were based on the units as fixed by the sub-contract, then plaintiff was not entitled, either to collect the sums of money demanded by it, or to abandon the contract."

The eighth is granted.

"The Court instructs the jury that, under the terms and provisions of paragraph 7 of the sub-contract between plaintiff and defendant, the former is not entitled to recover damages or money compensation from the defendant, even though it would appear from the evidence that plaintiff was obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of the Government of the United States, the Supervising Architect, or his representatives, or by defendant, or by alterations required in the work, since, by the provisions of said para-
270 graph, the only remedy of plaintiff in such cases is the time allowance therein provided for; unless, however, you should believe from the evidence that the defendant failed to provide labor and materials not included in the sub-contract, in such manner as to delay the material progress of the work."

The ninth is refused as drawn.

The tenth is granted.

"The Court instructs the jury with regard to the requests for payment made by plaintiff, and the payments made by defendant, for work and labor furnished, plaintiff was not entitled to receive any payment from defendant except for work and labor actually furnished in and upon said building, and that in the computation of the value of such work and labor, plaintiff was not entitled to receive any greater sums than were allowed by the sub-contract."

You see that I have covered the most of this before.

"So that, if you believe from the evidence that the units established by defendant, and insisted upon by it in this connection, were in accordance with the terms of the said sub-contract, then plaintiff was not entitled to receive from defendant the sums requested by it, which were based upon a higher, or greater, unit of price."

The eleventh is granted.

"The Court instructs the jury that if you believe from the evidence that the unit of $1.07 per cubic foot for the concrete work done by plaintiff, and for which plaintiff demanded payment based upon such unit, was in excess of the unit recognized by the
271 sub-contract for such concrete work, or if you believe from the evidence that the Government of the United States, by its representatives, has established, as between it and the defendant, a lower unit for such concrete work, done by plaintiff, then plaintiff was not entitled to payment for work done on the basis of the said unit of $1.07.

And you are further instructed that the fact that defendant may by error or miscalculation of the Government have received an overpayment from the Government on account of such concrete work done by plaintiff—such overpayment being based upon the application of the unit of $1.07—plaintiff was not entitled to receive any part of such overpayment from defendant, although plaintiff demanded the same in its requests for payments."

The twelfth is granted.

"The Court instructs the jury that, with the exception of the work done in the erection of the area walls and approaches," which I excluded, as you will bear in mind, "plaintiff was under the obligation to supply concrete work and granite setting in a good and workmanlike manner, and if you believe from the evidence that plaintiff failed or refused to perform this work in a proper manner, then defendant is entitled to a reasonable sum for putting such work in proper condition.

There is no contradiction of the testimony as to the value of this work done by defendant, and, therefore, you shall allow the same, if you believe, as above stated, that said work as done by
272 plaintiff was improperly done, or would put defendant to expense for its completion under the general contract."

The thirteenth is granted.

"The Court instructs the jury that, under the sub-contract, defendant is entitled to a reasonable allowance as compensation for the operation of the derricks and engine furnished by defendant to plaintiff: and defendant had the right to deduct such expenses from the payments to which plaintiff was entitled for work done by it," if you find that any was due.

There is no evidence to contradict the testimony of defendant as to the reasonableness of the compensation in this respect, and you shall allow the same as a deduction against the amounts for which plaintiff requested payment."

With these instructions and with the sincere thanks of the Court for the parience with which you have borne the discomforts, you are directed to retire to your jury room in the custody of the Marshal, select one of your number as Foreman, and proceed to the consideration of the case.

The following exceptions to the Instructions of the Court were taken by counsel for the plaintiff, in the presence of the jury and before they had retired from the bar to consider their verdict.

1. To that part of the charge which was worded as follows:

"At about the same time in January, it was deemed advisable by the Supervising Inspector of the Office of the Supervising
273 Architect of the United States, who was in immediate charge and supervision for the United States, to cause certain changes in the foundation plans for the contemplated building to be made in advance of any work. This was laid before the general contractor and acceded to by him, although it involved a change in the plans upon which he had accepted his contract. Such change was then approved by the Office of the Supervising Architect of the

United States, and the change was begun to be made in the manner which has been detailed before you, but which is not material."

2. To that part of the charge which was worded as follows:

"and with those men skilled only in the making of molds and forms, as was also the representative of the plaintiff company at San Juan." The same being a part of the following complete sentence of the charge: "At any rate, contemporaneously, the representative of the plaintiff company began the work here of establishing itself, of fitting up a shop for the making of the molds and forms necessary in the prosecution of this work, and proceeded with that with a very few men, and with those men skilled only in the making of molds and forms, as was also the representative of the plaintiff company at San Juan."

3. To that part of the charge which was worded as follows:

"Upon August 5th, the plaintiff company was notified by the defendant to begin its work under the sub-contract."

274 4. To that part of the charge which was worded as follows:

"On December 21, 1911, skilled men were brought down by the plaintiff company, not only for the prosecution of the molding and preparing of the concrete for the walls, but also for setting granite."

5. To that part of the charge which was worded as follows:

"They had never reached an agreement, and never did reach an agreement, as to either the basis or the units which should be used in making the settlements between them."

6. To that part of the charge which was worded as follows:

"In the meantime, the controversy as to unit and basis of payment was going on between the plaintiff and the defendant."

7. To that part of the charge which was worded as follows:

"One of the provisions of the general contract, which, among all other provisions, was read into the sub-contract, was one permitting the Government, at its option, at any time, to stop work on the building."

8. To that part of the charge which was worded as follows:

"There is no allegation, nor was there any testimony that the work of underpinning this building in a safe way was pro-

275 ceeded with in any wrong manner, or with any unnecessary delay."

9. To that part of the charge which was worded as follows:

"I instruct you that even if there was delay in furnishing granite, there could have been no liability under the sub-contract for such delay, in money, but such a condition was to be remedied by an extension of time for completion, as therein provided."

10. To that part of the charge which was worded as follows:

"Notice was given to plaintiff on August 5, 1911, to start setting granite, derricks were up by the first week in September, and work was started on October 16th. It is for you to decide who was at fault for that delay."

11. To that part of the charge which was worded as follows:

"You are also to decide whether the derricks that were on the ground prior to the first week in September, breast derricks and gins,

could have been used in carrying out any of the obligations imposed upon the plaintiff company by the contract, at a date prior to the first week in September, or whether they could have been sufficiently and profitably occupied during the early period of July while the underpinning was being made secure and until the derricks were completed as they now exist, in making molds and forms which would be necessary for the use and quick completion of the
276 work."

12. To that part of the charge which was worded as follows:

"The testimony shows, uncontradicted, that it had on the ground but one or two men, skilled, and only slightly skilled, in the setting of masonry, from the time it first landed on the Island until December 21, 1911."

13. To that part of the charge which was worded as follows:

"I instruct you that no delay caused by the action of the government for the purposes which I have detailed, under the provisions of the general contract which was read into the sub-contract, including the right to stop work, must be considered by you."

14. To that part of the charge which was worded as follows:

"You are only to consider the delays, if any, which were caused by the failure of the general contractor to furnish suitable labor and materials on the work, as contemplated in the sub-contract."

15. To that part of the charge which was worded as follows:

"The fact that the defendant had been paid by a former Supervising Inspector at one unit rate, which, when the second Inspector came, was held and declared by him to be incorrect,—and an
277 acknowledgment has been made by the defendant that on account of it he is in debt to the Government of the United States on that account in the sum of about eight thousand Dollars,—conferred no right upon the sub-contractor to receive payment on any other basis or at any other unit rate than that which is provided for in the contract which he entered into."

16. To that part of the charge which was worded as follows:

"There was testimony here as to the probable profits which the plaintiff company would have gotten if the contract had proceeded in the ordinary and usual manner of such contracts, but that was based on nothing, and makes you pass rapidly from the realm of guess to the realm of conjecture. Thousands of contingencies might happen in the meantime which might destroy any profit and perhaps cause a loss to the plaintiff company in carrying out its contract."

17. To that part of the charge in which the Court reading from the case of Phillips, Etc. Construction Co. v. Seymour, 91 U. S., 652, quoted as follows:

"It is said that the Court erred in admitting evidence on the part of plaintiffs of the profits they would have made on the remaining part of the road if defendant had paid, so that they could go on.

Whether the evidence which was given on this subject was admissible or not was rendered immaterial by the subsequent ruling of

the judge, who instructed the jury to disregard it, and to
278 allow the plaintiffs nothing on the ground of such profits; and it is manifest from the record that nothing was allowed for this in the verdict."

and thereupon continued to instruct the jury:

"I so instruct you here."

18. To that part of the charge which was worded as follows:

"It is in evidence that certain material and appliances, which were used by the plaintiff company in the carrying out of its contract, so far as it was carried out, are now, or were at one time, placed in the custody and charge of the defendant company, and that the value of them was about three thousand dollars, although it was not entered into in detail."

19. To the Court's refusal to give plaintiff's requested instruction to the jury numbered 1, because it had been covered by a modified oral instruction:

"If you find that the defendant failed to make payments as called for by the contract, on account of work done by the plaintiff in accordance with the terms of the contract, such failure constitutes a breach of the contract on the part of the defendant, and justified the plaintiff in stopping work under the contract, and entitles it to recovery from the defendant of such damages as may be proper on the evidence and under the instructions which the Court will give you in that regard."

20. To the Court's refusal to give plaintiff's requested
279 instruction to the jury numbered 2, because it had been covered by a modified oral instruction:

"If you find that owing to the acts of the defendant, the plaintiff was prevented from completing the work under the contract during the time set therefor by the contract, or a reasonable extension thereof, then the defendant was guilty of a breach of the contract, and justified the plaintiff in stopping work under the contract, and entitles it to recover from the defendant such damages as may be proper on the evidence, and under the instructions which the Court will give you in that regard."

21. To the Court's refusal to give plaintiff's requested instruction to the jury numbered 3, because it had been covered by a modified oral instruction:

"In estimating the recovery to which the plaintiff is entitled, if you find he is entitled to recover, you should consider the reasonable expenditures incurred, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract."

22. To the Court's refusal to give plaintiff's requested instruction to the jury numbered 4, because it had been covered by a modified oral instruction:

"In estimating the amount which the plaintiff is entitled to recover, if you find that he is entitled to recover, you can consider

the reasonable actual expenditures incurred in connection
280 with the contract, including amounts paid for labor, work, materials, salaries, necessary tools and equipment, deducting therefrom the value of said tools remaining on hand and in possession of the plaintiff, if any, the unavoidable losses incident to stoppage, the amount of work actually put into the building in accordance with the contract, the amount of time devoted by officers of the plaintiff to the work, fair and reasonable value of the work already done, on the basis of the contract price, and the amount of profits which plaintiff may have shown by proper evidence he would have recovered if permitted to complete the work under the contract, by the defendant."

23. To the Court's refusal to give plaintiff's requested instruction to the jury numbered 5, as drawn:

"You are instructed that a Supervising Engineer for the Government had no authority to order deviations from the specifications, unless duly authorized thereto by the Government, or unless such deviations were subsequently ratified by the Government, and that the defendant was bound to know of this rule of law."

The Court instructing the jury as to this exception added:

"But the deviations from the contract here were ordered and ratified by the Government."

24. To the Court's refusal to give plaintiff's requested instruction to the jury numbered 6, as drawn:

"You are instructed that if you find that a material change was made by the defendant in the designs, plans or speci-
281 fications which were originally made a part of the contract between the parties, that this justified the plaintiff in refusing to go on with the contract, and entitled it to recovery from the defendant of such damages as may be proper under the evidence and under the instructions which the Court will give you in that regard."

25. To the Court's refusal to give plaintiff's requested instruction to the jury numbered 7, as drawn:

"If you find from the acts of defendant, plaintiff was reasonably entitled to believe that defendant intended to continue committing breaches of the contract, either by refusing to or continuing to refuse to pay installments when due, or by preventing plaintiff from finishing within contract time, or a reasonable extension thereof, even though defendant's breaches did not amount to a physical obstruction or prevention of performance by plaintiff, then you can give plaintiff damages, including the profits which he may have shown that he would have made. Lake Shore versus Richards, 152 Ill. 59; 30 L. R. A. 33."

26. To the Court's refusal to give plaintiff's requested instruction to the jury numbered 8, as drawn:

"If you find that defendant's refusal to make payments was so inexcusable or unreasonable as to indicate an utter inability or unwillingness on the part of defendant to carry out the contract according to its terms, or to amount to a refusal to perform in the future, you can include in the measure of damages, such profits as
282 plaintiff may have shown he could have made. Wharton v. Winch, 140 N. Y. 278; 35 N. E. 589."

27. To the Court's refusal to give plaintiff's requested instruction to the jury numbered 13, as drawn:

"You are instructed that the fact that the owner of this building, and the party making the principal contract with the defendants for its construction, was the United States Government, instead of an individual makes no difference in the rights of these parties under their sub-contract, but plaintiff's rights are exactly the same as though no question of public property were involved."

The Court adding the following:

"However, as I have already instructed you, subject to all the provisions of the general contract."

28. To the Court's refusal to give plaintiff's requested instruction to the jury numbered 14, as drawn:

"You are instructed that the provisions in the contract between the defendant company and the United States, allowing the latter to suspend the work and to make changes and modifications in the plans and specifications covered and included only such suspensions and modifications as might reasonably be foreseen from the terms of the contract as originally made: That if you believe from the evidence the change finally made in the character of the foundations could not have been reasonably foreseen, then such change in foundations gave the defendant company, as principal contractor, the right or option to abandon his contract: and that the
283 plaintiffs, as sub-contractors, thereby became entitled to the same right or option, even though defendants as principal contractors, were induced not to exercise such right or option on their part."

29. To the Court's refusal to give plaintiff's requested instruction to the jury numbered 15:

"A Superintendent of Construction acting for the United States has no authority to make modifications to plans or specifications without instructions from his superior, and as the evidence is uncontradicted that Mr. Stierle, First Superintendent of Construction for the Government, received no authority from the Treasury Department to make, or consent to any, alterations in plans or specifications until May, 1911, you are instructed that defendants cannot excuse any delay before that time on the ground of right of Government to modify or change plans or specifications."

30. To the granting by the Court of the second instruction requested on behalf of the defendant, as follows:

"The Court instructs the jury as a matter of law that the defendant is not liable to the plaintiff for any delay in the execution by it of either its original contract with the Government of the United States, or its sub-contract with the plaintiff, which results from the action of the Government of the United States, or its authorized representatives: therefore, the Court instructs you that as to any or all delays which you may believe under the evidence resulted from the action of the representatives of the Government
284 of the United States in changing the foundations or plans of the Federal Building in question, or otherwise, the defendant is not liable therefor, and the plaintiff cannot recover."

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31. To the granting by the Court of the 4th instruction, as modified, on behalf of the defendant, as follows:

"The only question- submitted for your consideration are:

First. If you believe that whatever delay may have occurred in connection with the execution of the contract between plaintiff and defendant, resulted from the action of the Government of the United States, as above set forth, then you shall find for the defendant.

Second. If you should find under the evidence that there was delay in the execution of the contract, which was not caused by the Government of the United States, then you are instructed that the defendant is not liable for any such delay unless it resulted from its failure to provide labor and materials other than that provided in the subcontract."

32. To the granting by the Court of the 5th instruction, as modified, on behalf of the defendant, as follows:

"The Court instructs the jury that, if you believe from the evidence that the defendant was not guilty of any delay in providing labor and materials not included in the subcontract, in such manner as not to delay the material progress of the work, then the plaintiff was not justified in abandoning the contract with defendant,
285 and consequently, under the terms and provisions of paragraph 5 of the sub-contract, the defend*ant* has a right to retain until the completion of the work any sums of money which might at the time of such abandonment have been due to the plaintiff. Therefore, even if you find under the evidence, that at the time of such abandonment, there was any sum due or owing from the defendant to the plaintiff, the latter is not entitled to recover the same in this action."

33. To the giving by the Court of the 7th instruction asked by defendant, as requested:

"The Court instructs the jury that with respect to payments on account, the only subject of discussion between plaintiff and defendant is the application of the proper unit price for the labor and materials actually incorporated in the work: Therefore, if you believe from the evidence that the payments made to plaintiff by defendant were based on the units as fixed by the sub-contract, then plaintiff was not entitled, either to collect the sums of money demanded by it, or to abandon the contract."

34. To the giving of the 8th instruction requested by defendant, as follows:

"The Court instructs the jury that, under the terms and provisions of paragraph 7 of the sub-contract between plaintiff and defendant, the former is not entitled to recover damages or money compensation from the defendant, even though it should appear from the evidence that plaintiff was obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of the Government of the United States, the Supervis-
286 ing Architect, or his representatives, or by defendant, or by alterations required in the work, since, by the provisions of said paragraph, the only remedy of plaintiff in such cases is the

time allowance therein provided for; unless, however, you should believe from the evidence that the defendant failed to provide labor and materials not included in the sub-contract, in such manner as to delay the material progress of the work."

35. To the giving of the 10th instruction requested by defendant, as follows:

"The Court instructs the jury with regard to the requests for payment made by plaintiff, and the payments made by defendant, for work and labor furnished, plaintiff was not entitled to receive any payment from defendant except for work and labor actually furnished in and upon said building, and that in the computation of the value of such work and labor, plaintiff was not entitled to receive any greater sums than were allowed by the sub-contract."

36. To the giving of the 11th instruction requested by defendant, as follows:

"The Court instructs the jury that if you believe from the evidence that the unit of $1.07 per cubic foot for the concrete work done by the plaintiff, and for which plaintiff demanded payment based upon said unit, was in excess of the unit recognized by the sub-contract for such concrete work, or if you believe from the evi-
dence that the Government of the United States, by its repre-
287 sentatives, has established, as between it and the defendant,
a lower unit for such concrete work done by plaintiff, then plaintiff was not entitled to payment for work done on the basis of the said unit of $1.07."

37. To the giving of the 12th instruction requested by defendant, as follows:

"The Court instructs the jury that, with the exception of the work done in the erection of the area walls and approaches, which I excluded, as you will bear in mind, plaintiff was under the obligation to supply concrete work and granite setting in a good and workmanlike manner, and if you believe from the evidence that plaintiff failed or refused to perform this work in a proper manner, then, defendant is entitled to a reasonable sum for putting such work in a proper condition.

There is no contradiction of the testimony as to the value of this work done by defendant, and, therefore, you shall allow the same, if you believe, as above stated, that said work as done by plaintiff, was improperly done, or would put defendant to expense for its completion under the general contract."

38. To the giving of the 13th instruction as requested by defendant, as follows:

"The Court instructs the jury that, under the sub-contract, defendant is entitled to a reasonable allowance as compensation for
the operation of the derricks and engine furnished by de-
288 fendant to plaintiff: and defendant has the right to deduct
such expenses from the payments to which plaintiff was entitled for work done by it, "if you find that any was due."

There is no evidence to contradict the testimony of defendant as to the reasonableness of the compensation in this respect, and you shall allow the same as a deduction against the amounts for which plaintiff requested payment."

But the said Judge did then and there rule severally on each prayer that it should not be granted, and he then and there severally refused to instruct the jury as requested in each said request to charge, to each of which rulings and refusals of said judge, the plaintiff by his attorney did then and there except.

At the close of the case defendant asked the following instructions, which were either refused or modified by the Court, to wit:

Instruction No. 1. The Court instructs the jury as a matter of law that under the evidence adduced in this cause you must find the issues therein in favor of the defendant, because of the action attempted to be set forth against defendant in the complaint filed by plaintiff and the only matter to be decided is as to what dam-
289 age, if any, you may believe under the evidence in this case defendant has suffered or may suffer by reason of the abandonment by plaintiff of the sub-contract with the defendant.

The Court refused to grant this instruction. Whereupon defendant there and then duly noted its exception.

Defendant further requested the Court to grant the following instruction:

3. The Court instructs the jury as a matter of law that the plaintiff cannot recover from the defendant for alleged failure to furnish granite under the sub-contract, for the reason that defendant would be liable only for delay in providing labor and materials not included in the contract, in accordance with clause 11 of sub-contract.

The Court refused to grant this instruction as drawn. Whereupon defendant then and there duly noted its exception.

Defendant further requested the following instruction:

6. The Court instructs the jury that independently of the question of liability for delay, the failure of defendant to make payments to the plaintiff upon requests or estimates presented in the months of December, nineteen hundred and eleven, January and February, nineteen hundred and twelve, was not in law sufficient cause for plaintiff to abandon the contract with defendant, in view of the evidence adduced in this cause to the effect that re-
290 quests or estimates were during such time the subject of bona fide investigation and discussion.

The Court refused to grant this instruction. Whereupon defendant then and there duly noted its exception.

Thereupon defendant requested of the Court to grant the following instruction:

8. The Court instructs the jury that under the terms and provisions of paragraph 7 of the sub-contract between plaintiff and defendant the former is not entitled to recover damages or money compensation from the defendant even though it should appear from the evidence that plaintiff was obstructed or delayed in the prosecution of completion of the work by the neglect, delay or default of the Government of the United States, the supervising architect or his representatives, or by the defendant, or by alterations required in the work, since by the provisions of said paragraph the only remedy of plaintiff in such case is the time allowance therein provided for; unless, however, you should believe from the evidence that the de-

fendant failed to provide labor and materials not included in the sub-contract in such manner as to delay the material progress of the work; but you are instructed, however, that in accordance with the terms and provisions of the original contract between plaintiff and defendant, subject to which the plaintiff entered into the sub-contract, the Government of the United States or its authorized representatives is the only competent authority to determine
291 whether or not there has been delay in the material progress of such work.

This instruction was refused as requested. The Court thereupon gave it in the following form:

8. The Court instructs the jury that under the terms and provisions of paragraph 7 of the sub-contract between plaintiff and defendant the former is not entitled to recover damages or money compensation from the defendant even though it should appear from the evidence that plaintiff was obstructed or delayed in the prosecution or completion of the work by the neglect, delay or default of the Government of the United States, the supervising architect or his representatives, or by the defendant or by alterations required in the work, since by the provisions of the said paragraph the only remedy of plaintiff in such case is the time allowance therein provided for; unless, however, you should believe from the evidence that the defendant failed to provide labor and materials not included in the sub-contract in such manner as to delay the material progress of the work. Thereupon defendant duly noted his exception of such action of the Court.

Defendant further requested of the Court to grant the following instruction:

9. The Court instructs the jury that even if you believe from the evidence that the defendant failed to provide labor and materials not included in the sub-contract in such manner as to cause delay, still such fact or circumstance would not give plaintiff the right
292 of action against defendant unless you find from the evidence that the supervising architect of the United States or his authorized representatives officially has determined that such delay interfered with the material progress of the work.

The Court refused to grant this instruction as requested. Whereupon defendant then and there duly noted an exception.

Upon the request of plaintiff the Court gave the following instruction:

Fifth instruction for plaintiff: "You are instructed that the supervising engineer for the Government had no authority to order deviations from the specifications unless duly authorized thereto by the Government or unless such deviations were subsequently ratified by the Government, and that the defendant was bound to know of this rule of law."

Defendant duly noted its exception to the giving of such instruction.

The Court granted at the request of plaintiff its instruction No. 9, as follows:

"If you find that the plaintiff has proved expenditures in the work under the contract the burden of proof is on the defendant to

show that they are unreasonable, otherwise they will be presumed to be reasonable and proper."

To the giving of this instruction defendant then and there duly noted its exception.

293 At the request of plaintiff the Court granted its exception No. 10, as follows:

"The clause of the sub-contract providing that if the defendant delays plaintiff the plaintiff shall have an extension of time equivalent thereto, refers only to a reasonable delay. It is for you to decide under the general instructions whether this delay under all the circumstances was reasonable or unreasonable."

To the giving of this instruction defendant then and there duly noted its exception.

The Court granted at the request of plaintiff the latter's instruction No. 11, as follows:

"The provision of the contract between the P. J. Carlin Construction Company and the Guerini Stone Company covering extensions of time beyond the time stated in the contract to the sub-contractor is not exclusive and does not bar the sub-contractor from other remedies."

To the granting of this instruction defendant then and there duly noted its exception.

At the request of plaintiff the Court granted the latter's instruction No. 12, as follows:

"All testimony and evidence on behalf of the plaintiff which has been admitted without objection must be considered to be material and within the allegations of the complaint as amended; and all claims that such admitted testimony and evidence are immaterial and outside the allegations of the complaint must be disregarded."

294 To the giving of this instruction defendant then and there noted its exception.

Upon the request of plaintiff the Court granted the latter's instruction No. 13, as follows:

"You are instructed that the fact that the owner of this building and the party making the principal contract with the defendants for its construction was the United States Government instead of an individual, makes no difference in the rights of these parties under their sub-contract, but plaintiff's rights are exactly the same as though no question of public property were involved."

To the giving of this instruction defendant then and there duly noted its exception.

Thereupon defendant excepted to the action of the Court in its charge to the jury in the following respects, to-wit:

(*a*) That part of the charge reading as follows:

"I instruct you that even if there was delay in furnishing granite, there could have been no liability under the sub-contract for such delay, in money, but such a condition was to be remedied by an extension of time for completion, as therein provided. Defendant could not have permitted the work to go on until those footings were made secure, even if it so desired. The Government, under its option, would have stopped the work. However, notice was given to plain-

tiff on August fifth, nineteen hundred and eleven, to start
295 setting granite, derricks were up by the first week in September, and work was started on October sixteenth. It is for you to decide who was at fault for that delay."

The part of the foregoing portion of the *cah*rge which defendant excepted to is the last phrase, to wit:

"It is for you to decide who was at fault for that delay."

(*b*) "It is in evidence that certain materials and appliances, which were used by the plaintiff company in the carrying out of its contract, so far as it was carried out, are now, or were at one time, placed in the custody and charge of the defendant company, and that the value of them was about three thousand dollars, although it was not entered into in detail. I don't know whether even a *a*chedule of them, was not in, was it?

"Mr. PAINE: Yes, sir.

"For that, credit must be given in whatever decision you arrive at, to the plaintiff company, and in the uncontradicted sum of three thousand dollars."

And the said jury after having heard the evidence, the charge of the judge, and the various matters aforesaid, retired to consider of their verdict and thereafter returned into Court a sealed verdict as follows:

"We, the jury, find for the plaintiff and assess its damages in the sum of six thousand six hundred and nine dollars (6,609.25) and twenty-five cents, including the value of tools inventoried at $3,000.00.

296 (Sgd.) JOHN M. TURNER, *Foreman.*

Mr. DEXTER: I don't know whether that verdict is intended to include the tools and apparatus as well.

The COURT: All the apparatus.

The FOREMAN: Everything was on the inventory that was presented.

Mr. DEXTER: The defendant desires to have that made clear, because of the pendancy upon the equity side of this Court of certain injunction proceedings having for their object the possession of that property.

The COURT: As I remember my instruction to you, it was that you should consider those tools and accessories whatever they might be, as being those which were set down on the inventory which was exhibited before you.

The FOREMAN: And that is what we considered, and the valuation of which you gave us, as I remember it, as $3,000.00.

THE COURT: But covering all the items set down in the inventory and which were in the possession of the defendant?

The FOREMAN: Yes, Your Honor.

Mr. DEXTER: I should like to have the jury, in view of those circumstances, reform their verdict.

The COURT: I think it is pretty clear, Mr. Dexter.

Mr. BANIGAN: I think the testimony was $3,500.00 and the inventory value was given as $3,500.00.

297 The COURT: As I remember the testimony of Mr. Follett, which I afterwards checked by my own notes, which I keep copiously, he said that he had offered to sell them for $3,000. They might have been inventoried at $3,500.00.

Mr. BANIGAN: I think the testimony of Mr. Converse was that he estimated them to be worth from thirty-five to thirty-eight hundred, and Mr. Follett estimated them at thirty-five hundred dollars.

The COURT: This is the verdict of the jury, and I think it is specific enough.

Mr. DEXTER: The only thing I wanted to suggest to your Honor was that the word "tools" might not be comprehensive enough. There were concrete mixers.

The COURT: Isn't that a tool?

The FOREMAN: Yes, sir; that was included in our verdict.

The COURT: That was your intention?

The FOREMAN: Just as your Honor gave it to us yesterday, that those tools were to be assessed, if we found for the plaintiff, at $3,000.00.

And forasmuch as the matters above set forth do not fully appear of record, the plaintiff and defendant tender this their joint bill of exceptions, and pray that the same may be signed by the Judge of this Court, pursuant to law; which is done accordingly this 11th day of November, A. D. 1913.

(Signed) PETER J. HAMILTON, *Judge.*

298 In the District Court of the United States for Porto Rico.

(Filed Jan. 17, 1913.)

Law No. 891.

GUERINI STONE COMPANY, Plaintiff,

vs.

P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

It is hereby certified and agreed by E. S. Paine, attorney for plaintiff herein, and Frank H. Dexter, who, at the time of the conducting of the trial of this case, and at the time hereinafter specified was counsel of record for the defendant herein, that during said period the following stipulation was agreed to between counsel for both parties in this cause, and the same is now signed to give effect thereto;

It is hereby stipulated by and between the undersigned attorneys for the respective parties herein*m* that at the time the order was entered granting to the defendant, P. J. Carlin Construction Company, an extension of time in which to file its record on writ of error in this cause in the Office of the Clerk of the Supreme Court of the United States in Washington, it was also ordered that the Plaintiff, Guerini Stone Company should have the same extension of time wherein to file its record on writ of error with said Clerk of said Supreme Court of the United States.

Dated San Juan, P. R., January 17, 1913.

(Signed) E. S. PAINE,
Attorney for Plaintiff.

(Signed) FRANCIS H. DEXTER,
Attorney for Defendant at the Time.

299 In the District Court of the United States for the District of Porto Rico.

Filed June 19, 1913.

#891. Law.

GUERINI STONE COMPANY, Plaintiff,
vs.
P. J. CA-LIN CONSTRUCTION Co., Defendant.

Order.

On motion of the plaintiff herein, it is hereby ordered nunc pro tunc as of February 28th, 1913 that plaintiff's and defendant's time for filing and settling their bill of exceptions in this cause be, and it hereby is extended over the term and until the 10th day of July 1913, and it is hereby ordered nunc pro tunc as of February 28th, 1913, that plaintiff's and defendant's time for filing their record on writ of error in the Supreme Court of the United States be and it hereby is extended until the first day of October, 1913.

San Juan, P. R., June 19th, 1913.

[SEAL.] (Signed) PETER J. HAMILTON,
Judge of the U. S. District Court for P. R.

300 In the District Court of the United States for Porto Rico.

Filed July 1st, 1913.

Law. No. —

GUERINI STONE COMPANY, Plaintiff,
vs.
P. J. CARLIN CONSTRUCTION Co., Defendant.

Order.

Upon the sitpulation hereto annexed, it is hereby ordered that the time in which both parties hereto may file and obtain the settlement of Bill of Exceptions on Writ of Error herein is hereby extended until September 1st, 1913, and the time of both parties hereto to file their records on Writ of Error in the Supreme Court of the United States is hereby extended until December 1st, 1913.

Dated San Juan, P. R., July 1st, 1913.

[SEAL.] (Signed. PETER J. HAMILTON,
Judge of the District Court of the United States for Porto Rico.

301 In the District Court of the United States for Porto Rico.

Law. No. —

GUERINI STONE COMPANY, Plaintiff,
vs.
P. J. CARLIN CONSTRUCTION COMPANY, Defendant.

Stipulation.

It is hereby stipulated by and between the respective parties hereto by their undersigned counsel, as follows:

The Bill of Exceptions hereinbefore filed with the Clerk of this Court by counsel for the Guerini Stone Company, the plaintiff herein, is accepted and agreed on, and will be used as a joint Bill of Exceptions by both parties hereto on Writ of Error to the Supreme Court of the United States, provided, however, that there shall be inserted therein by defendant correct copies of such exhibits received in evidence at the trial of the cause as may be designated by counsel for defendant, and that there shall be included in said Bill of Exceptions all exceptions noted by counsel for defendant to the refusal of the Court at the trial to give instructions to the Jury requested by counsel for defendant; also all exceptions noted by counsel for defendant to the allowance by the Court at the trial of requests for instructions by counsel for plaintiff, and the objections noted by counsel for defendant to the charge of the Court to the Jury at the trial of said cause, and that the bill of exceptions herein filed by plaintiff, but not yet settled shall be altered in form to conform to the terms of this stipulation.

302 The time for filing and settling said joint Bill of Exceptions is extended until September 1st, 1913, and the time for filing the record of Writ of Error of both parties hereto in the Supreme Court of the United States is extended until September 1st, 1913.

Dated San Juan, P. R., June 30th, 1913.

(Signed) E. S. PAINE,
Attorney for Plaintiff.

(Signed) F. H. DEXTER,
Attorney for Defendant.

The time for filing and settling the said joint bill of exceptions is extended to November 1st, 1913, and the time for filing the record on Writ of Error of both parties hereto in the Supreme Court of the United States is extended to February 1, 1914.

Dated Sept. 30, 1913.

(Signed) E. S. PAINE,
By FRANCIS E. NEAGLE,
Attorney for Plaintiff.

(Signed F. H. DEXTER,
Attorney for Defendant.

303 In the District Court of the United States for the District of Porto Rico.

Filed September 30th, 1913.

#891. Law.

GUERINI STONE COMPANY
vs.
P. J. CARLIN CONSTRUCTION CO.

Now on this day, upon motion of F. H. Dexter, attorney for the defendant herein, and by the consent of E. S. Paine, attorney for the complainant herein, it is hereby ordered that the time for filing and settling the bill of exceptions is hereby extended to November 12th, 1913, and that the time for filing the record of Writ of Error of both parties hereto in the Supreme Court of the United States is hereby extended until February 1st, 1914.

304 In the District Court of the United States for the District of Porto Rico.

Filed November 11th, 1913.

#891. Law.

GUERINI STONE COMPANY
vs.
P. J. CARLIN CONSTRUCTION CO.

Come Francis E. Neagle and F. H. Dexter, attorneys for the respective parties herein and present to the Court a joint bill of exception which is signed by the Court.

Whereupon said attorneys make a joint motion, that the parties stipulate that all prior extensions of time have been duly and validly made and that the bill of Exception is signed within the time allowed by law, and ask the Court to enter upon the minute of the Court this day, that the Honorable Judge of this Court is the successor of the Honorable Paul Charlton, the Judge before whom this cause was tried, and is, under the Act of Congress, the proper person to sign the Bill of Exceptions in this case. The motion is granted and it is so ordered by the Court.

305 In the District Court of the United States for Porto Rico.

#891, Law.

GUERINI STONE COMPANY
vs.
P. J. CARLIN CONSTRUCTION COMPANY.

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico, do hereby certify *that* the foregoing typewritten pages numbered 1 to 304 inclusive, to be a true and correct copy of certain proceedings in the above entitled cause, as called for by the præcipes filed by the counsel for the appellant, copies of said præcipes are hereto attached.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, this 20th day of January, A. D. 1914.

[Seal of the United States District Court for the District of Porto Rico.]

ANTONIO AGUAYO, *Clerk*,
By L. A. GROSS, *Deputy*.

Endorsed on cover: File No. 24,072. Porto Rico, D. C. U. S. Term No. 374. Guerini Stone Company, plaintiff in error, vs. P. J. Carlin Construction Company. File No. 24,073. Term No. 375. P. J. Carlin Construction Company, plaintiff in error, vs. Guerini Stone Company. Filed February 27th, 1914. File Nos. 24,072 and 24,073.

12

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 378

GUERINI STONE COMPANY,
Plaintiff-in-Error,

against

P. J. CARLIN CONSTRUCTION COMPANY,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR

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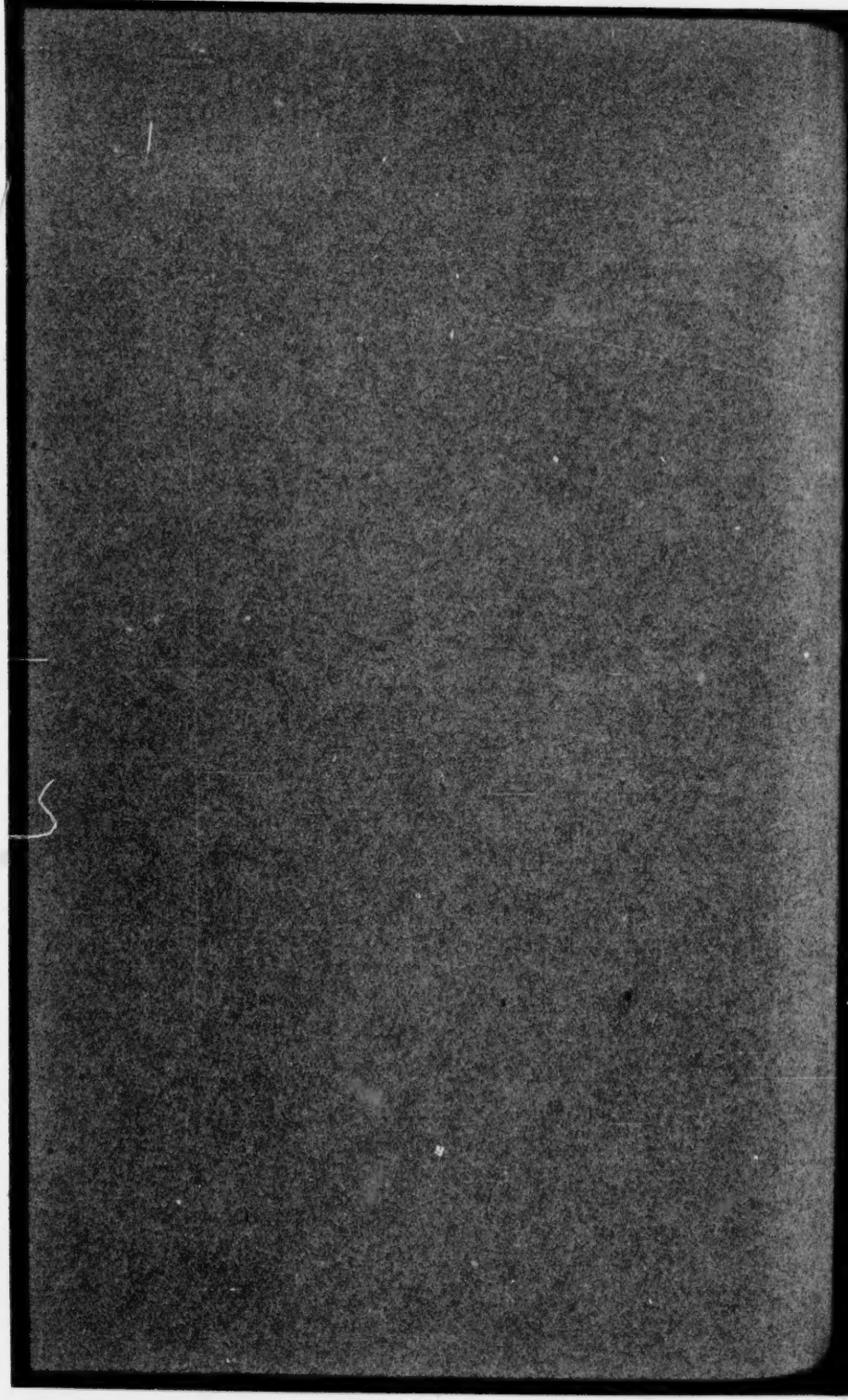

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Supreme Court of the United States

OCTOBER TERM, 1914.

GUERINI STONE COMPANY, Plaintiff-in-Error, against P. J. CARLIN CONSTRUCTION COMPANY, Defendant-in-Error.	No. 374

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

Preliminary Statement.

This is a writ of error from a judgment of the District Court of the United States for Porto Rico, dated November 16, 1912, in favor of the plaintiff-in-error, who was the plaintiff below, in the sum of $6,609.25, together with interest and costs.

The suit was at law, brought by the plaintiff-in-error, Guerini Stone Company, against P. J. Carlin Construction Company for damages alleged to have been sustained by the former by reason of the breaches by the defendant below of a contract between the parties. The contract provided for the doing of certain work by plaintiff, as a sub-contractor, for defendant, who was the general contractor for the construction of the Federal post office and

court building in San Juan, Porto Rico. The defendant-in-error also sued out a writ of error from the judgment, and by agreement between counsel a joint bill of exceptions was prepared and certified to this Court, and accordingly the record as printed contains the joint bill of exceptions prepared by both parties. The defendant-in-error has, however, now elected to dismiss its writ of error.

The contention of the plaintiff-in-error is that by reason of errors committed at the trial, its case was not allowed to come properly before the jury, resulting in a verdict in a sum much less than it was entitled to receive.

In view of the fact that the record of the testimony is voluminous and contains many exhibits, our statement of the facts will be rather full, for the purpose of enabling the Court to refer therefrom to the material portions of the testimony.

Statement of Facts.

The defendant, P. J. Carlin Construction Company, secured a contract with the Government of the United States for the construction of the Federal post office and court building in San Juan, Porto Rico. This contract is in evidence (Record, p. 66). Defendant thereupon entered into a contract with plaintiff (Plaintiff's Ex. 1, Record, p. 18), whereby the plaintiff agreed to construct the walls, floors and roof of the building (Clause 1st of the Contract), and also agreed, at the option of the defendant general contractor, to set in position all the granite walls and other granite work on the building (Clause 25th of the Contract). The plaintiff's work was to begin after the defendant had constructed the foundations of the building up to the basement floor level.

The contract further provided that the plaintiff sub-contractor should wholly finish its work within

300 days from the date upon which the building was ready to receive the work, and should begin work within three days from the time that it was notified by the general contractor that the building was ready to receive such work (Clause 6th of the Contract).

The contract further provided that the defendant general contractor would provide all labor and materials not included in the sub-contract in such a manner as not to delay the material progress of the work, and in the event of failure so to do, was bound to reimburse the plaintiff sub-contractor for loss thereby caused.

The contract nowhere incorporates by reference thereto any of the terms of the contract between the United States and the general contractor. In Paragraph First of the contract it is provided that the work shall be done to the satisfaction of "James Knox Taylor, Architect."

The contract further provided that the price to be paid to the sub-contractor should be $64,750, and that such sum should be paid in monthly payments on account, not to exceed 85% of the cost of the work actually erected in the building, provided the sub-contractor furnished to the general contractor a written requisition on a form to be supplied by the general contractor not less than twelve days before payment was required.

Under date of January 10, 1911, the defendant notified the plaintiff by telegram that "work must start at once" (Plaintiff's Ex. 4, Record p. 31). This telegraphic notice was confirmed orally by the defendant to plaintiff during the middle or latter part of January (Record, p. 31). Thereupon the plaintiff sent representatives to Porto Rico, who found that the work was not ready for them to go ahead under their contract (Record, p. 24). Plaintiff kept employees on the ground expecting

to begin work on the building within a few weeks, and was ready and willing to go to work on the building. This condition of affairs lasted until the 1st of October. In September defendant exercised its option to call on plaintiff to set the granite, and a start was made at this work about the middle of October,. which was the date when granite was first provided by the defendant (Record, p. 25).

During this period the defendant had not finished the foundation work which was to be performed by it so that the building had arrived at a stage which would permit of plaintiff's proceeding to work. The original specifications in the Government's contract with the general contractor called for a specified type of foundation, including piles driven into the soil on which the foundation should rest. On May 13, 1911, the P. J. Carlin Construction Company proposed to the Government that the piles should be omitted from the foundation, and offered to deduct about $5,000 from their contract price for the omission of this piling. This offer was accepted by the Government (Defendant's Ex. 52, Record, p. 128; Defendant's Exs. 23, 24, Record, p. 107). Defendant's witness testified that the actual work of beginning the foundation was started in February, and that it should not have taken more than three or four months to put in all of the foundations; it did take six, and that the reason for the delay was because of the change which was made from the original plans and specifications as to the foundation (Record, p. 89).

The granite setting continued from the 16th of October, 1911, to the 12th of February, 1912. According to plaintiff's witnesses the granite was not delivered in such a manner as to permit of reasonable progress by plaintiff under its contract (Record, p. 26).

By January 26, 1912, the plaintiff had only been able to do some small amounts of work on the principal portion of the contract, that is, the concrete construction, and by that date had placed 468 cubic yards of concrete. On March 9, 1912, plaintiff Company was ordered by the defendant Company to cease all work. By that time plaintiff had been able to place only about 600 cubic yards of concrete. Plaintiff's witness testified that the slow progress in making concrete was not due to plaintiff's inability to make it, but because there was lack of place to put it (Record, p. 29).

On the 25th of January, 1912, a representative of the United States Government had come to Porto Rico and ascertained that the foundations had settled. There were variations in the foundation work from the specifications between the Government and the Carlin Construction Company (Record, p. 53). From March 9, 1912, up to the 10th of December, 1912, conditions were such that it was impossible for the Guerini Stone Company to continue with their work under the contract (Record, p. 54). The P. J. Carlin Construction Company was doing all the work on the foundations. It was not done in accordance with the specifications of the contract with the Government as to size, depths, widths and thickness, and there was a question as to the character of the concrete and the re-enforcing. These variations between the foundations as they were actually put in place and the foundations as called for in the specifications might have caused the settlement of the foundations, and would certainly have contributed to their settlement later (Record, p. 56). Defendant's witness testified that the variations in the foundations from the specifications were authorized by the then federal inspector who was on the ground at the time (Record, p. 86).

Under date of March 25, 1912, P. J. Carlin Construction Company was notified by the United States Structural Engineer that the entire building would have to be underpinned in order to secure a safe foundation, and that he had been directed to prepare drawings and specifications for the necessary work and to obtain a proposal from them for doing the work, with the distinct understanding that the acceptance was subject to subsequent settlement of responsibility for the departures from the contract drawings on account of which the underpinning was necessary (Defendant's Ex. 41, Record, p. 117).

Under date of March 30th the New York office of the P. J. Carlin Construction Company received a letter signed by R. O. Bailey, Assistant Secretary of the Treasury, stating that their representative in San Juan had been instructed to stop all work on the post office in that city, pending the settlement of responsibility for deviations from contract regarding the foundations (Defendant's Ex. 42, Record, p. 118).

Under date of April 1, 1912, the P. J. Carlin Construction Company was notified by letter signed by E. C. Heald, the Government Structural Engineer, that they should indefinitely suspend all work on the building pending further orders (Deft's. Ex. 43, Record, p. 118).

After this stoppage of the work, due to the settlement of the foundations, the post office building remained in practically the same condition as it was when the work was stopped up to the time of the trial of the case in November, 1912. Under date of May 4, 1912, Assistant Secretary of the Treasury, R. O. Bailey, wrote to the P. J. Carlin Construction Company notifying them that in view of the public exigency requiring immediate performance of the work on the post office building,

the Government agreed that they should continue the work and to be paid therefor the absolute cost thereof, and their time for completion of the entire work under the contract was extended from November 1, 1912, to May 1, 1913, all without prejudice to any rights of the United States under the original contract and bond (Deft's. Ex. 48, 2nd Document, Record, p. 122).

The plaintiff put in testimony to prove the amount of work done by it under its contract, including the number of yards of concrete erected and the number of square feet of granite set. Under date of December 19, 1911, the plaintiff wrote the defendant asking for blank forms of application for payments, and under date of December 20th, twelve blank forms were sent by defendant to plaintiff (Pltff's. Exs. 9 and 10, Record, pp. 33, 34). Under date of December 30, 1911, plaintiff made demand on defendant on one of said blank forms for payment of $5,654, being the amount of work completed to date, minus 15 per cent. deducted under the terms of the contract, and the amount corresponding to the number of square feet of granite set at the contract price (Pltff's. Ex. 11, Record, p. 34). Under date of January 16, 1912, the plaintiff wrote to the defendant asking for a payment of $10,000. Under date of January 17, 1912, plaintiff wrote defendant making application on one of defendant's forms for $12,750. Several letters of demand were sent by plaintiff to defendant requesting payment, and the president of plaintiff company, on or about February 1, 1912, went to New York and had an interview with the defendant and obtained a check for thirty-seven hundred and odd dollars. There was a discussion as to the unit prices which should be used as a basis for applications of payment. The president of plaintiff company testified that a typewritten statement was

handed to him by defendant, with the agreement that the figures therein contained should constitute a basis for settlements between the parties. This typewritten schedule was put in evidence as Plaintiff's Exhibit 20, page 40 of the Record. Defendant's president testified that there was no agreement at that time to the effect that these figures should be used as a basis of settlement (Record, pp. 91, 92). Under date of March 9, 1912, plaintiff made an itemized demand for the sum of $11,735.95, being the amount of work completed to date, minus cash received and 15 per cent. deduction in accordance with the terms of the contract. More correspondence followed with regard to payment, and plaintiff's president again went to New York for the purpose of obtaining payment. He received $674, which he accepted with objections as to the amount (Record, p. 45). Further correspondence demanding payment followed, and the latter part of April, 1912, the president and the secretary of plaintiff company went to New York and demanded payment in accordance with the terms of the contract. Payment was refused (Record, p. 49).

The P. J. Carlin Construction Company, as general contractor, was paid by the Government on account of work done by the Guerini Stone Company about $19,000. Against this amount the Guerini Stone Company was paid about $4,500 by the P. J. Carlin Construction Company, according to the defendant's own testimony (Record, p. 93).

The defendant disputed the amount of work claimed to have been done by the plaintiff, and also claimed to have been overpaid by the Government on account of the work done by the Guerini Stone Company. Defendant also contended that owing to various deductions which it claimed to be entitled to make there was an actual balance of only about $400 due after deducting the 15 per cent.

which was to be retained under the contract, and claimed that they were not obliged to pay this amount because of the Guerini Stone Company's abandonment of the contract (Record, p. 91).

Under date of May 22, 1912, the plaintiff wrote defendant rehearsing the alleged breaches by defendant of the contract with regard to delays and failure to make payments, and notifying defendant that the plaintiff elected to terminate the contract and proceed no further with the work, and would hold defendant liable for damages (Pltff's Ex. 36, Record, p. 50).

The plaintiff proved damages in the sum of $45,693.22 in accordance with the amended bill of particulars printed on pages 9 and 10 of the Record. The testimony appears on pages 57, 60, 51 and 52 of the Record. It was full and complete, was substantiated by plaintiff's books and vouchers, and there was no attempt made to dispute it. On pages 51 and 52 appears testimony in detail fully substantiating the claim of $9,700 for anticipated profits based on estimates made by the witness covering the amount of every item of expense entering into the performance of plaintiff's work under the contract and deducting the amount so arrived at from the contract price.

The gist of plaintiff's claim was that under the terms of its contract with defendant it was entitled to be allowed to proceed with its work at such a rate as would permit of plaintiff's completing the work to be done by it within the period of 300 days provided therefor in the contract, or at least within a time reasonably approximating the contract period, and that it had not been permitted so to do; that on the 22nd day of May, when plaintiff notified defendant that it would not proceed with its work under the contract and would hold defendant

liable for its damages, there had elapsed since the date when plaintiff was notified that the work must start at once and since it had been ready and willing to proceed with its work, more than sixteen months, and that at that time the work had been stopped indefinitely; that no further work could have been done by plaintiff up to the time of trial in November, 1912, and that according to the testimony of the Government Engineer (Record, p. 54) if the work had then been started with and carried on with reasonable diligence and speed, it would have been the last of 1913 before it could have been completed.

Plaintiff also claimed that it had done work under its contract of a fair and reasonable value amounting at least to over $15,000; that on account of this work the general contractor had been paid by the United States about $19,000, and that in spite of repeated demands on the part of the plaintiff in accordance with the terms of the contract, nevertheless defendant had failed and refused to pay it more than about $5,000 on account thereof. For these alleged breaches of contract the plaintiff claimed to be entitled to recover the amount of its actual damages in the way of expenditures by it under the contract and the profits which it would have made if defendant had complied with its obligations thereunder.

The defendant contended that its delay was justified by reason of the fact that the United States Government had ordered a change in the foundations from the original specifications of the contract between the general contractor and the Government; that by reason of the collapsing of the foundations during the progress of the work the Government had again ordered a change in the foundations, and during the investigation preceding this second change the work had been stopped at the

order of the United States Government. Defendant also contended that it had not been guilty of default in making payments to the plaintiff under the contract.

The jury returned a verdict in plaintiff's favor in the sum of $6,609.25 (Record, p. 12).

SPECIFICATIONS OF ERRORS UNDER RULE 21.

We will specify the various errors relied on in such a way that those which raise the same question will be set out in the same group.

I.

INCORPORATING THE TERMS OF THE MAIN CONTRACT BETWEEN THE GOVERNMENT AND DEFENDANT INTO THE SUB-CONTRACT BETWEEN PLAINTIFF AND DEFENDANT.

Error 1. The court erred in admitting in evidence the contract between the defendant and the Government of the United States (Record, p. 61, Deft's. Ex. 1), and the proposals and specifications connected therewith (Record, p. 74, Deft's. Ex. 2). To the admission of these exhibits the plaintiff objected on the ground that they were immaterial, as not binding on the plaintiff in that the relations, rights and obligations between the plaintiff and defendant were covered solely by the terms of the contract between them. This objection was overruled by the court and the plaintiff noted an exception.

Error 2. The court erred in permitting the following question to be asked by the defendant:

> "As a result of the settling of the foundation, Mr. Berryman, is it not a fact that the

> Federal Government, or the Government of the United States has ordered additional work or changes upon the foundations as originally planned?" (Record, p. 54.)

To this question counsel for plaintiff objected on the ground that any material alteration or variation in the contract between the defendant company and the United States was not binding on the plaintiff company and could not change the relations, rights and obligations between plaintiff and defendant arising out of the sub-contract between them. This objection was overruled and counsel for the plaintiff noted an exception. In reply to this question the witness testified that on the 9th of March the work was suspended by the Government.

Error 3. The court erred in charging the jury as follows:

> "One of the provisions of the general contract, which, among all other provisions, was read into the sub-contract, was one permitting the Government, at its option, at any time, to stop work on the building."

To this charge counsel for plaintiff duly objected and excepted (Record, p. 151, Exception No. 7).

The charge of the Court is printed in full on pp. 142 *et seq* of the Record.

Error 4. The court erred in charging the jury as follows:

> "I instruct you that no delay caused by the action of the government for the purposes which I have detailed, under the provisions of the general contract which was read into the sub-contract, including the right to stop work, must be considered by you."

To this charge counsel for the plaintiff duly objected and excepted (Record, p. 152, Exception No. 13).

Error 5. The court erred in charging the jury as follows:

> "You are only to consider the delays, if any, which were caused by the failure of the general contractor to furnish suitable labor and materials on the work, as contemplated in the sub-contract."

To this charge counsel for the plaintiff duly objected and excepted (Record, p. 152, Exception No. 14).

Error 6. The court erred in refusing to give plaintiff's requested instruction, as requested, as follows:

> "You are instructed that the fact that the owner of this building and the party making the principal contract with the defendants for its construction was the United States Government, instead of an individual makes no difference in the rights of these parties under their sub-contract, but plaintiff's rights are exactly the same as though no question of public property were involved."

To this the court added the following:

> "However, as I have already instructed you, subject to all the provisions of the general contract."

To this modification counsel for the plaintiff duly objected and excepted (Record, p. 155, Exception No. 27).

Error 7. The court erred in charging the jury at the request of the defendant as follows:

> "The Court instructs the jury as a matter of law that the defendant is not liable to the plaintiff for any delay in the execution by it of either its original contract with the Government of the United States, or its sub-contract with the plaintiff, which results from the action of the Government of the United States, or its authorized representatives: therefore, the Court instructs you that as to any or all delays which you may believe under the evidence resulted from the action of the representatives of the Government of the United States in changing the foundations or plans of the Federal Building in question, or otherwise, the defendant is not liable therefor, and the plaintiff cannot recover."

To the giving of this instruction counsel for the plaintiff duly objected and excepted (Record, p. 155, Exception No. 30).

II.

CHARGING THAT PLAINTIFF WAS NOT ENTITLED TO PROFITS.

Error 8. The court erred in charging the jury as follows:

> "There was testimony here as to the probable profits which the plaintiff company would have gotten if the contract had proceeded in the ordinary and usual manner of such contracts, but that was based on nothing, and makes you pass rapidly from the realm of guess to the realm of conjecture. Thousands of contingencies might happen in the meantime which might de-

> stroy any profit and perhaps cause a loss to the plaintiff company in carrying out its contract."

To this charge counsel for the plaintiff duly objected and excepted (Record, p. 152, Exception No. 16).

Error 9.—The court erred in charging the jury as follows (reading from *Phillips, etc.* v. *Seymour*, 91 U. S., 652):

> "'It is said that the Court erred in admitting evidence on the part of plaintiffs of the profits they would have made on the remaining part of the road if defendant had paid, so that they could go on.
>
> "'Whether the evidence which was given on this subject was admissible or not was rendered immaterial by the subsequent ruling of the judge, who instructed the jury to disregard it, and to allow the plaintiffs nothing on the ground of such profits; and it is manifest from the record that nothing was allowed for this in the verdict.' I so instruct you here."

To this charge counsel for the plaintiff duly objected and excepted (Record, p. 152, Exception No. 17).

Error 10. The court erred in refusing to give plaintiff's requested instruction as follows:

> "In estimating the recovery to which the plaintiff is entitled, if you find he is entitled to recover, you should consider the reasonable expenditures incurred, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price,

> and the profits which plaintiff could have made if allowed to complete the work under the contract."

To this refusal counsel for the plaintiff duly objected and excepted (Record, p. 153, Exception No. 21).

Error 11. The court erred in refusing to give plaintiff's requested instruction as follows:

> "If you find from the acts of defendant, plaintiff was reasonably entitled to believe that defendant intended to continue committing breaches of the contract, either by refusing to or continuing to refuse to pay installments when due, or by preventing plaintiff from finishing within contract time, or a reasonable extension thereof, even though defendant's breaches did not amount to a physical obstruction or prevention of performance by plaintiff, then you can give plaintiff damages, including the profits which he may have shown that he would have made (*Lake Shore* v. *Richards*, 152 Ill., 59: 30 L. R. A., 33)."

To this refusal counsel for the plaintiff duly objected and excepted (Record, p. 154, Exception No. 25).

Error 12. The court erred in refusing to give plaintiff's requested instruction to the jury as follows:

> "If you find that defendant's refusal to make payments was so inexcusable or unreasonable as to indicate an utter inability or unwillingness on the part of defendant to carry out the contract according to its terms, or to amount to a refusal to perform in the future, you can include in the measure

of damages, such profits as plaintiff may have shown he could have made (*Wharton* v. *Winch*, 140 N. Y., 287; 35 N. E., 589)."

To this refusal, counsel for the plaintiff duly objected and excepted (Record, p. 154, Exception No. 26).

III.

CHARGING THAT THERE WAS NO EVIDENCE THAT THE FOUNDATION WORK WAS IMPROPER.

Error 13. The court erred in charging the jury as follows:

"There is no allegation, nor was there any testimony that the work of underpinning this building in a safe way was proceeded with in any wrong manner, or with any unnecessary delay."

To this charge counsel for the plaintiff duly objected and excepted (Record, p. 151, Exception No. 8).

IV.

CHARGING THAT THERE WAS NO LIABILITY AGAINST DEFENDANT FOR MONEY DAMAGES FOR DELAY.

Error 14.—The court erred in charging the jury as follows:

"I instruct you that even if there was delay in furnishing granite, there could have been no liability under the sub-contract for such delay, in money, but such a condition was to be remedied by an extension of time for completion, as therein provided."

To this charge counsel for the plaintiff duly ob-

jected and excepted (Record, p. 151, Exception No. 9).

Error 15. The court erred in giving the instruction requested by the defendant as follows:

> "The Court instructs the jury that, under the terms and provisions of paragraph 7 of the sub-contract between plaintiff and defendant, the former is not entitled to recover damages or money compensation from the defendant, even though it should appear from the evidence that plaintiff was obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of the Government of the United States, the Supervising Architect, or his representatives, or by defendant, or by alterations required in the work, since, by the provisions of said paragraph, the only remedy of plaintiff in such cases is the time allowance therein provided for; unless, however, you should believe from the evidence that the defendant failed to provide labor and materials not included in the sub-contract, in such manner as to delay the material progress of the work."

To this charge counsel for the plaintiff duly objected and excepted (Record, p. 156, Exception No. 34).

V.

ERRORS SHOWING THAT THE CASE AS A WHOLE WAS NOT ALLOWED TO BE CORRECTLY OR FAIRLY PRESENTED TO THE JURY.

Error 16. The court erred in charging the jury as follows:

> "They had never reached an agreement, and never did reach an agreement, as to either the basis or the units which should be used in making the settlements between them."

To this charge counsel for the plaintiff duly objected and excepted (Record, p. 151, Exception No. 5).

Error 17. The court erred in admitting in evidence a bid covering completing the work included in the Guerini Stone Company's contract by another contractor, which bid was not accepted by the P. J. Carlin Construction Company. This evidence was objected to by counsel for the plaintiff on the ground that inasmuch as it had never been accepted by the P. J. Carlin Construction Company, it was not relevant to prove the cost of doing the work nor admissible to show the damages suffered by the P. J. Carlin Construction Company by reason of the termination of the contract by the Guerini Stone Company. This objection was overruled and an exception noted by counsel for the plaintiff. The witness then read in full the document which showed the total amount of the bid to be $104,250 (Record, pp. 94, 132).

Error 18. The court erred in charging the jury as follows:

> "Notice was given to plaintiff on August 5, 1911, to start setting granite, derricks were up by the first week in September, and work was started on October 16th. It is for you to decide who was at fault for that delay."

To this charge counsel for the plaintiff duly objected and excepted (Record, p. 151, Exception No. 10).

Error 19. The court erred in admitting testimony on the part of defendant's witness, Joseph P. Carlin, covering transactions in Porto Rico while the witness was in New York, of which he was informed solely by letters received from Porto Rico. This evidence was objected to as hearsay and the objection was overruled and exception noted by counsel for the plaintiff (Record, pp. 86, 89, 90). The witness was permitted to reply to the following question:

> "What was the condition of affairs here in San Juan with respect to the ability of the Carlin Company to proceed with the foundation work at that time?"

To this question the witness replied that changes were made in the foundation (Record, pp. 86 and 87).

In reply to further questions, the witness testified that the defendant had never failed to furnish labor and materials for the contract and that the Guerini Stone Company had caused delay by failure to furnish labor and materials (Record, pp. 89 and 90).

Error 20. The court erred in charging the jury as follows:

> "and with those men skilled only in the making of molds and forms as was also the representative of the plaintiff company at San Juan?"

To this charge counsel for the plaintiff duly objected and excepted (Record, p. 151, Exception No. 2).

Error 21. The court erred in charging the jury as follows:

> "It is in evidence that certain material

and appliances, which were used by the plaintiff company in the carrying out of its contract, so far as it was carried out, are now, or were at one time, placed in the custody and charge of the defendant company, and that the value of them was about three thousand dollars, although it was not entered into in detail."

To this charge counsel for the plaintiff duly objected and excepted (Record, p. 153, Exception No. 18).

OUTLINE OF ARGUMENT.

The plaintiff in error will argue the following points:

POINT I.

The contract between the United States Government and the defendant formed no part of the contract between the defendant and the plaintiff, and the question whether any or all of defendant's delay was due to orders on the part of the Government had no bearing on the liabilities of defendant to plaintiff under the contract between them.

The errors raising this point are specified under I, Errors Nos. 1 to 7, inclusive.

POINT II.

The Court erred in charging that prospective future profits could not be recovered.

The errors raising this point are specified under II, Errors Nos. 8 to 12, inclusive.

POINT III.

The Court erred in charging that there was no testimony to the effect that defendant constructed the foundations improperly.

The error raising this point is specified under III, Error No. 13.

POINT IV.

The Court erred in charging that the defendant could not be liable in money damages for delay in furnishing the granite or for delays other than failure to provide labor and material.

The errors raising this point are specified under IV, Errors Nos. 14 and 15.

POINT V.

Owing to the commission of repeated errors prejudicial to the plaintiff by the Court below, the case as a whole was not correctly or fairly presented to the jury.

(a) The court erred in charging that the plaintiff and defendant never reached an agreement as to the units to be used as a basis of settlement.

The error raising this point is specified under V, Error No. 16.

(b) The court erred in admitting in evidence an unaccepted bid as proof of the cost of completing the work covered by plaintiff's contract.

The error raising this point is specified under V, Error No. 17.

(c) The court erred in charging that the plaintiff company was notified on August 5th to begin work on the granite setting.

The error raising this point is specified under V, Error No. 18.

(d) The testimony of defendant's witness, Joseph P. Carlin, admitted over plaintiff's repeated objection, was obviously hearsay and inadmissible.

The error raising this point is specified under V, Error No. 19.

(e) The court erred in charging that the plaintiff's representative and workmen were unskilled.

The error raising this point is specified under V, Error No. 20.

(f) The court erred in charging that the value of the tools which were turned over to the defendant under agreement by the plaintiff was $3,000, and in refusing to correct this statement in accordance with the evidence.

The error raising this point is specified under V, Error No. 21.

Argument.

POINT I.

The contract between the United States Government and the defendant formed no part of the contract between the defendant and the plaintiff, and the question whether any or all of defendant's delay was due to orders on the part of the Government, had no bearing on the liabilities of defendant to plaintiff under the contract between them.

The contract between the defendant corporation and the United States Government under the terms of which the Federal Building in San Juan was to be built by the defendant company was admitted into evidence over plaintiff's objection (Defendant's Ex. 1, Record, p. 61 *et seq.*). By the terms of this contract the United States Government reserved the right to stop work on the Federal Building at any time (Record, p. 70, fol. 112). The United States Government ordered changes in the work during the spring of 1911, and ordered all work stopped on the Federal Building on May 9, 1912, and on that date the plaintiff was notified by the defendant to stop work under its sub-contract with the defendant. (Deft's. Ex. 27, p. 45.)

The charge of the court in regard to damages suffered by plaintiff on account of such delays as were caused by the orders of the Government is contained in Exception 13 on page 152 of the Record, reading as follows:

> "I instruct you that no delay caused by the action of the Government for the purposes which I have detailed under the provisions of the general contract which was read into the sub-contract, including the

right to stop work, must be considered by you."

The court also charged:

> "One of the provisions of the general contract, which, among other provisions, *was read into the sub-contract,* was one permitting the Government, at its option, at any time, to stop work on the building."
> (Record, p. 151; Exception No. 7.)

The court also charged (Record, p. 155, Exception No. 30):

> "The court instructs the jury as a matter of law that the defendant is not liable to the plaintiff for any delay in the execution by it of either its original contract with the Government of the United States, or its subcontract with the plaintiff, which results from the action of the Government of the United States, or its authorized representatives: therefore, the court instructs you that as to any or all delays which you may believe under the evidence resulted from the action of the representatives of the Government of the United States in changing the foundations or plans of the Federal Building in question, or otherwise, the defendant is not liable therefor, and the plaintiff cannot recover."

Other charges of the trial judge and rulings on evidence to the same effect are contained in our assignment of errors under heading I.

The contract between the plaintiff and defendant is set out in full beginning on page 18 of the Record. Nowhere does it contain any express reference to any contract between the defendant and

the United States Government. There is clearly nothing in the contract between the parties which expressly incorporates therein the terms of the contract between the defendant and the Government, and nothing appears in the Record wherefrom it may be argued that the contract between the Government and the defendant was impliedly incorporated into the contract between plaintiff and defendant.

The words "and to the satisfaction of the general contractors and James Knox Taylor, architect," cannot amount to an incorporation in the sub-contract of all the terms and provisions of the main contract. While it seems to have been the fact that James Knox Taylor was the architect of the United States Government (this, however, does not appear affirmatively in the contract nor in the evidence), the provision that the work must be performed to his approval amounts to no more than the ordinary provision which is practically universal in building contracts to the effect that performance of the work must be approved by the architect of the owner. Surely it cannot be seriously argued that this clause as to approval by an architect by some side wind carries with it into the sub-contract all of the terms and conditions of the main contract between the general contractor and the Government. The court below apparently went so far, however, as to hold that James Knox Taylor was a party to the contract.

> "Subsequently and upon December 16, 1910, a contract was entered into between the plaintiff's assignor, as sub-contractor, and the defendant company and James Knox Taylor, who it is admitted was at that date supervising architect of the Treasury of the United States."
>
> (Opinion of the Court, Record, p. 54.)

The fact that the United States Government instead of an individual was a party to the main contract cannot alter the ordinary rules of contract rights and obligations. There is no such magic in the Government's name. When the Government voluntarily goes into the business of building construction and makes contracts with private individuals, the ordinary laws of contracts must apply, particularly as to contracts between private individuals who are general contractors and private individuals who are sub-contractors.

The court below also seemed to go on the theory that any contract between the owner of a building and a general contractor was by force of law to be read into any contract between a general contractor and a sub-contractor (or at least that such is the case where the United States Government is a party to the main contract) in any case where the sub-contractor "had knowledge of the existence of a contract" between the general contractor and the owner and "the presumption of law therefore arises that it had knowledge of the provisions of the general contract" (Opinion of the Court, Record, p. 54). Any such presumption of law would frequently be contrary to the facts.

There is no legal principle whereby a contract between one set of parties can be read into a contract between another set of parties without the consent, express or implied, of the parties who are to be bound by the terms so read in. If it had been the intent of plaintiff and defendant that the terms of the contract with the Government should be binding on plaintiff, it would have been the simplest thing in the world to have made express mention of this fact. No such mention was made and the presumption which flows therefrom, if there is any presumption at all, is that the parties to the subcontract did not so desire or intend. It may well

be that the Guerini Stone Company for its own protection definitely refused to be bound by any provisions as to stoppage or interruption of work provided for in the contract between the Government and the general contractors, and that it was thus the actual intention of the parties that the Guerini Stone Company should not be so bound. Such an inference is more justly to be drawn from the failure to make any reference to the main contract in the sub-contract than any inference or implication that the parties intended to incorporate the one in the other. Accordingly it seems clear that it is no defense, partial or entire, to plaintiff's cause of action for delay that all or part of the delay on the part of the general contractor may have been caused by orders of the Government under the provisions of the contract between the Government and the general contractor. As between plaintiff and defendant, the plaintiff was entitled to performance by the defendant of its obligations as to time of performance under the contract between the parties and without reference to any contract to which plaintiff was not a party. Clearly the court cannot make a new contract for the parties.

This misconception on the part of the court below was fundamental and was of the greatest prejudice to the plaintiff, particularly with regard to the measure of plaintiff's recovery. There is testimony in the case to the effect that a substantial portion of the delay on defendant's part in constructing the foundations and bringing the work on the building up to the point where plaintiff could proceed with its work, was due to the acceptance by the Government of the defendant's proposition to change the plan of the foundations and the negotiations leading thereto. Here was a substantial delay caused or ratified by the orders of the

Government. Later it appears that owing to the collapse of defendant's foundations, a complete stoppage of the work took place under the orders of the Government.

As the case was submitted to the jury, instead of the clean-cut proposition that defendant by the terms of the contract between the parties was liable for all delay in construction, if such delay amounted to a breach of the contract, and in such case plaintiff was entitled to recover all damages properly proved by it, the jury had to consider, in arriving at their verdict, that plaintiff was not entitled to recover for such damages or expenditures as were incurred as a result of delays resulting from orders of the Government as distinguished from damages or expenditures arising from delays on the part of the defendant not resulting from Government orders.

In view of the finding of a verdict in favor of plaintiff by the jury, which of itself determines the proposition that the contract was broken by defendant, and in view of the fact that the jury's verdict was for only a small part of the amount of damages actually proved to have been sustained by the plaintiff, it seems clear that the jury's decision was definitely affected by the error complained of, as the verdict can be explained consistently on no other theory.

The authorities are clear to the effect that the terms of the contract between the Government and the general contractor are not to be incorporated in the contract between plaintiff and defendant and that they furnish no defense to the defendant under the circumstances here alleged and proven.

The case of *Noyes* v. *Butler Bros.*, 98 Minn., 448, is squarely in point. In that case a builder contracted to build a wing on the State Capitol at Bismark. The contract contained a clause which said:

> "The contractor shall allow and include in his bid $5 per square foot for art glass * * *, but the Capitol Board, with the architect, shall have the right to select and purchase the art glass."

The builder then made a sub-contract with plaintiff whereby plaintiff was to supply all the glass for the wing. Thereafter the Capitol Commissioners exercised the option contained in their contract with the defendant builder and purchased the art glass from another concern. The defendants notified the plaintiffs of this and the contract was modified, the plaintiff claiming that the sum agreed to be deducted from the amount due the plaintiff was $630 and the defendant claiming it was $1,320. (The jury brought in a verdict consistent with neither theory and therefore a new trial was ordered.) The defendant's motion for a directed verdict was denied, and the court said (p. 450):

> "Defendant's motion for a directed verdict is based upon the claim that the plans and specifications constituted a part of the contract, and that when plaintiffs submitted their bid of $1,800 they did so subject to that provision of the specifications which permitted the Capitol Commissioners to withdraw the art glass upon the basis of $5 per square foot. The trial court was justified in rejecting this proposition for the reason that the plans and specifications were not expressly made a part of the contract. The reference, then, in the letters above set out, applies simply to the amount and sizes required, and in the absence of an express agreement to that effect it will not be inferred that the parties contemplated, in submitting the bid of $1,800 for all the glass

> required, that, in case the Capitol Commissioners exercised the option, the amount should accordingly be reduced at $5 per square foot. * * * A reference to the plans and specifications for a specific purpose does not, of itself, imply an intention to adopt the same with respect to all other provisions and it is perfectly competent to refer to such contract for a specific purpose only."

The case of *Modern Steel Co.* v. *Eng. Construction Co.*, 129 Wisc., 31, is also in point. There a builder contracted to build a county court house and entered into a sub-contract with plaintiff. The sub-contractor sued the contractor for work and materials and a counterclaim was set up alleging damages to the contractor through the delay of the sub-contractor. In regard to one item of the counterclaim the court said (p. 40):

> "The remaining item of defendant's counterclaim is $3,000 * * *. He insists that this item should be allowed him upon the certificate of the superintendent given as of July 1, 1905. It is averred that the specifications provide for the appointment of a superintendent and that he should give all certificates to which the contractor should be entitled, and should determine 'the amount of damages which may have accrued from any cause' and that his certificate and decision should be binding and conclusive in all matters. These provisions were manifestly intended to apply to and bind the county and defendant, as the principal contractor in the construction of the building. The terms of this stipulation do not indicate however, that it is to be deemed a part of a sub-contractor's undertaking, and plain-

> tiff's agreement does not expressly provide that it shall be part of it. The situation is not within the decision of *Stein* v. *McCarthy,* 120 Wisc., 288, where the terms and conditions of the specifications and original contract were included as part of the obligation assumed by the sub-contractor."

In *Mannix* v. *Tryon,* 152 Calif., 31, a sub-contractor agreed with a contractor to plaster a building in accordance with the plastering specifications contained in the contract between the contractor and the owner. The work did not turn out successfully, through no fault of the sub-contractor. There was a clause of warranty in the original contract and the contractor held that this had been adopted by and become a part of the sub-contract. The court held, however, that only those specifications in the original contract which were specifically referred to were incorporated into the sub-contract. The court said, p. 39:

> "It is sufficient, however, on this point to say that the sub-contractor was not a party to this main contract, its provisions were not incorporated in his contract with the original contractor, and he is not bound by its terms. His contract was with the original contractor alone and related solely to doing the plastering and hard finishing according to the requirements of the specifications in the main contract and he is only bound by the terms of his agreement in that respect."

To the same effect see:

Young v. *Borzone,* 26 Washington, 4.
Moreing v. *Weber,* 3 Calif. App., 14.
Page on Contracts, Vol. II, p. 1736.

It is submitted that the facts shown in the record bring the case squarely within the statement of the general rule given by Elliott on Contracts, Vol. 4, Sec. 3632:

> "Where the terms of the original contract are not embodied in the contract between the contractor and the sub-contractor, the sub-contractor is not bound by the terms of the original contract."

POINT II.

The Court erred in charging that prospective future profits could not be recovered.

The plaintiff's 16th exception reads as follows (Record, p. 152):

> "16. To that part of the charge which was worded as follows:
>
> " 'There was testimony here as to the probable profits which the plaintiff company would have gotten if the contract had proceeded in the ordinary and usual manner of such contracts, but that was based on nothing, and makes you pass rapidly from the realm of guess to the realm of conjecture. Thousands of contingencies might happen in the meantime which might destroy any profit and perhaps cause a loss to the plaintiff company in carrying out its contract.' "

Other charges of the trial judge to the effect that the plaintiff was under no circumstances entitled to recover prospective future profits from the completion of its work under the contract are made

the basis of plaintiff's exceptions numbered 17 and 21 (Record, pp. 152 and 153). The same error occurs in the court's refusal to give the plaintiff's requested instructions to the jury numbered 7 and 8, which are set forth in plaintiff's exceptions numbered 25 and 26 (Record, p. 154).

These errors are all specified under II of our specification of errors.

The position of the court on the question of future profits was clearly erroneous. The law on the subject is well settled. It is set forth in the case of *United States* v. *Behan*, 110 U. S., 338, where the court laid down the following rule:

> "The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterson* v. *Mayor of Brooklyn*, 7 Hill, 69, they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for,

> the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation.' "

In the case at bar no question was raised nor could any be raised as to the remoteness of the future profits. Their loss was the direct result of the breach of the contract since the only future profits claimed by the plaintiff were the ones that would have been made directly from the performance of the contract, namely, the difference between the actual cost and the contract price. Evidence of the future profits was admitted without objection and an examination of this evidence shows that the profits were not speculative but were based on actual conditions on the ground and the work already done by the plaintiff under the contract.

The testimony on the question is as follows (Record, pp. 51 and 52):

> "I have been estimating on contract work since 1887, in large work covering practically the whole of the United States and outside. When contractors go to work to estimate the cost of a building which is to be constructed, they take the plans, and take off the quantities shown on the plans and as called for in the specifications, taking off the quantities on to estimating sheets, on which they are figured up and summarized. At the end of the process, you get a final sheet summarizing the quantities and the different classes of work to be done on the building, and you then put your unit prices, being your estimates of doing that particular class of work, carry out your multiplication, and add up the result. In arriving at unit prices, cost of labor in each particular local-

> ity is analyzed, cost of materials. If concrete, cost of broken stone, cement, sand delivered on the site, lumber, wage conditions, carpenter's wages, brick mason's wages, and putting all these things together get at the result. I have made three trips to Porto Rico aside from this one, putting in altogether sixty-six days. Our total estimate of the total cost to us of the Guerini Stone Company's work under the contract on the Federal Building was $53,012. Under the contract we were to be paid $64,750. Our estimate was based on our knowledge of local conditions, and based on the actual cost of work actually done on the Federal Building itself, which has proved correct when actually doing the work, not in interims, or loafing around. If we had been allowed to proceed with the work under the contract, it is my opinion that our estimate would have proved fair. The difference between these figures represents our anticipated profits. If we had been allowed to complete our contract under the ordinary and customary conditions in the building trade as they are understood and recognized, we should have made a profit of $9,700 and some odd."

This direct and specific testimony as to the amount of profits which would have directly resulted as the difference between actual cost and contract price was not even attempted to be shaken by cross-examination nor seriously disputed by conflicting evidence.

The charge of the trial judge was based on the ground that the prospective profits were too speculative and contingent to be allowed. But as shown by the evidence they were far less contingent and

speculative than in the average case in which they are allowed.

The language of the Circuit Court of Appeals in ~~Porter v. Harrison Constr. Co. and in re Feltheimer Pickel~~ *Co.*, 212 Fed., 353, is in point. The court said (p. 357):

> "True, the profits were unusually contingent in their character. If there had been high water in the river during all the period provided for the work, performance would have been impossible; abnormally high water or storms would have increased the expense and lessened the profits; *but difficulties of this class are attendant on most construction work, and they do not make the profits so speculative as to be no proper basis for damages.*"

The following cases, among others, support this view:

Anvil Mining Co. v. *Humble*, 153 U. S., 540.
City of Ironton v. *Harrison Constr. Co.*, 212 Fed., 353.
Penn. Steel Co. v. *N. Y. C. R. Co.*, 198 Fed., 721.
Kenney v. *Knight*, 127 Fed., 403.

This error directly affected the plaintiff's recovery at the jury's hands.

POINT III.

The Court erred in charging that there was no testimony to the effect that defendant constructed the foundations improperly.

The Court's charge on this point was as follows:

> "There is no allegation nor was there any testimony that the work of underpinning this building in a safe way was proceeded with in any wrong manner or with any unnecessary delay."
>
> (Charge of the Court, Record, pp. 143, 144; Plaintiff's Exception No. 8, Record, p. 151.)

This charge was absolutely contrary to clear and definite evidence.

As to improper construction, Mr. Berryman, who was the Government superintendent of construction and the officer who discovered the faults of defendant in constructing the foundations and insisted on their reconstruction, testified as follows:

> "There were variations in the foundations from the specifications in the contract. The P. J. Carlin Construction Company is doing all the work on the foundations as far as the Government is concerned. The work has not been done in accordance with the specifications as to size, in depths, widths and thickness. The character of the concrete and the reinforcing might also be in question. The variations between the foundations as they have actually been put in place and the foundations as called for in the specifications may have caused the settlement of the founda-

> tions, and would certainly contribute to the settlement of the foundations later. At this stage, there is very little weight on the walls, and it would be hard to tell which was the cause of the sinking. At the time of the sinking, the building had progressed about twenty per cent. in its construction. As the weight of the building increased the probability of sinking would increase tremendously."

This testimony referred to the construction during the period prior to the stoppage of the work on March 9, 1912, on the recommendation of the witness. In other words, it covers the period during which the plaintiff claimed that the defendant was at fault and responsible for delays resulting from improper construction in the foundation work.

As to delay, the defendant's own witness and President, Mr. Joseph P. Carlin, testified (Record, p. 89):

> "The foundations were completed up to the basement level ready for the structure above that about the 25th or 28th of July, 1911. This delay was caused because of the change which was made from the original plans and specifications which called for a pile foundation in the lower half of the building, which was subsequently changed by the Government in May, 1911, to spread footing foundations and the piles were omitted and we made a request for their omission at that time. The desire to omit these piles was first made known about January 25th to January 28th, 1911, and the actual order for their omission was not received until about May 13th, 1911. This delayed the execution of the work."

Furthermore, in the correspondence between the Government and the defendant with regard to curing the defects in the foundations, the Government expressly reserved the question as to whether or not the subsidence of the foundation was due to defendant's fault. (Exs. for Def. 41 and 42, Record, pp. 117, 118.)

The effect of this charge on the minds of the jury must necessarily have been to withdraw from their consideration, in estimating damages, all expenses, disbursements, losses and damages suffered by the plaintiff resulting from delays due to the construction and consequent sinking of the foundations in so far as the defendant was concerned. The defendant was completely white-washed in this respect. The Court, having held that the defendant was not liable for anything done under the orders of the Government, now instructs the jury that the defendant itself was not at fault in its method of constructing the foundations or in the time consumed in so doing. The plaintiff claimed, and was entitled to claim, not only that by the terms of its contract with the defendant it was entitled to be enabled to finish its work within the contract time or a reasonable extension thereof, irrespective of stoppage by the Government, but also that as a matter of fact the collapse of the foundations and the delays incident thereto were directly the fault of the defendant in not complying with the terms and specifications of its contract with the Government. There was direct and emphatic evidence to support this claim. This question, at least, should have been left open for the jury's consideration and decision thereon. As it was, the jury must have felt compelled by the Court's charge to disregard all delays resulting from the construction of the foundations and their sinking and to separate all delays caused by trouble with the foundations from de-

lays arising from other causes and to render their verdict for damages based only on such delays as were in evidence resulting from causes other than the foundation work. From the jury's point of view this would cut off from their consideration in estimating damages, a very large portion of the period during which the plaintiff was under expense while not being able to proceed with the work under its contract.

POINT IV.

The Court erred in charging that the defendant could not be liable in money damages for delay in furnishing the granite or for delays other than failure to provide labor and material.

The plaintiff excepted (Record, p. 151):

> "9. To that part of the charge which was worded as follows:
>
> "'I instruct you that even if there was delay in furnishing granite, there could have been no liability under the sub-contract for such delay, in money, but such a condition was to be remedied by an extension of time for completion, as therein provided.'"

The sentence excepted to appears in the judge's charge (Record, p. 144). The theory of the trial court, as appears from the remainder of the paragraph, apparently was that the seventh clause in the contract between plaintiff and defendant, which provided that the plaintiff should be entitled to an extension of time for delays caused by the defendant or the owner, and thus be relieved from the penalty of $20 a day for delay in

completing its work, prevented a suit for damages against the defendant caused by the defendant's delay.

The plaintiff also excepted to the allowance of defendant's request to charge No. 8 (Record, p. 149).

> "The Court instructs the jury that, under the terms and provisions of paragraph 7 of the sub-contract between plaintiff and defendant, the former is not entitled to recover damages or money compensation from the defendant, even though it should appear from the evidence that plaintiff was obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of the Government of the United States, the Supervising Architect, or his representatives, or by defendant, or by alterations required in the work, since, by the provisions of said paragraph, the only remedy of plaintiff in such cases is the time allowance therein provided for; unless, however, you should believe from the evidence that the defendant failed to provide labor and materials not included in the sub-contract, in such manner as to delay the material progress of the work."
>
> (Record, p. 156; Exception No. 34.)

The seventh clause in the contract between the parties provided in part, as follows (Record, p. 20):

> "Should the Sub-Contractor be obstructed or delayed in the prosecution or completion of the work by neglect, delay or default of the Owner, the Architect, the General Contractors, or of any other contractors employed by them upon the work, or by altera-

tions which may be required in said work, or by any damage which might happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employees through no fault of the Sub-Contractor then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be made unless a claim therefor is presented in writing to the General Contractors within twenty-four hours after the occurrence of such delay. The General Contractors shall award and certify, in writing, the amount of additional time to be allowed."

Paragraph six of the contract, immediately preceding the paragraph quoted above, provides that the sub-contractor shall wholly finish its work within the contract period of three hundred days, and further provides that the sub-contractor shall pay the sum of $20 for every day in excess of the contract period that its work shall remain unfinished.

The eleventh paragraph of the contract provides that the general contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the sub-contractor, agree that they will reimburse the sub-contractor for such loss. This paragraph also provides that if the sub-contractor shall delay the progress of the work so as to cause any damage for which the general contractors shall become liable, then he shall make good to the general contractors any such damage over and above any damage for general delay otherwise provided for in the contract.

The theory apparently adopted by the trial court was that by reason of these provisions in the contract, the only case of delay for which the general contractors might be liable to the sub-contractor was in the case of failure to provide labor and materials on that part of the work which was being done by the general contractors; so that the plaintiff could have no cause of action for other failures or delays or even stoppage or absolute prevention of their work by the general contractors. Paragraph seven of the contract is not to be so construed. Its purpose and effect is evidently to give the sub-contractor a defense against the provision that he shall be liable at the rate of $20 a day in case his work is not finished within the contract period, when his inability to so complete the work under his sub-contract is due to delay or default on the part of the owner or the general contractors. In other words, after imposing a liability on the sub-contractor for failure to perform within the contract time, a defense against this liability is given in the case where such failure is the fault of the general contractors or the owner rather than the fault of the sub-contractor. To go further and to construe this clause as depriving the sub-contractor of all relief other than an extension of time corresponding to the time lost by default of the owner or general contractors, would result in a situation which the courts should strain to prevent. If, as in our case, the general contractors so constructed the foundations as to result in their collapse, thereby preventing the sub-contractor from continuing his work within the contract period or a reasonable time thereafter, or if, as in our case, the general contractors instructed the sub-contractor to discontinue his work and thereby absolutely prevented the sub-contractor from performing within the contract time, it is obvious that

the sub-contractor must have his remedy by way of electing to terminate the contract and sue for damages, even though the delay on the part of the general contractors may not fall within the provisions of the eleventh clause referring solely to providing labor and materials. To hold otherwise would result in the situation that if the stoppage at the instance of the general contractors was due to any other cause than their failure to provide labor and materials, such as absolute prevention or orders to stop work, then and in that case the sub-contractor could be kept dangling for an indefinite number of years with no other remedy than the cold comfort that he could not be held responible in the sum of $20 a day for not concluding his work on time. Obviously the court will not so construe the contract as to arrive at such a result.

In any event and under any construction of these clauses, a limit would have to be imposed by holding that the general contractors should be liable for any delays on their part preventing performance by the sub-contractor for more than a reasonable time in excess of the time fixed by the terms of the contract. If this limitation of reasonable time is adopted, then the question as to whether or not the delay caused by the general contractors was a reasonable delay under all the circumstances of the case should have been left to the jury.

Furthermore, delay in furnishing granite was delay in furnishing materials.

The effect of these instructions by the court and of this attitude throughout the trial was again to prevent the jury from considering in their estimate of damages delays during which the plaintiff was put to heavy expense and loss and for which the defendant should properly have been held liable if, as they did, the jury found that the defendant had broken the contract.

Nelson v. *Pickwick Association Co.*, 30 Ill. App., 333.

Del Genovese v. *Third Ave. R. R. Co.*, 13 A. D., 412, 424, 425 (affd. by a unanimous court in 162 N. Y., 614.)

O'Heron v. *American Bridge Co.*, 177 Ill. App., 405.

POINT V.

Owing to the commission of repeated errors prejudicial to the plaintiff by the Court below, the case as a whole was not correctly or fairly presented to the jury.

We have not attempted to specify in this brief all of the exceptions which appear in the record, for the reason that we feel that it would be an imposition on the time of this Court to call upon it to consider so large a number of different points. Accordingly we will take up under this heading a few of the exceptions with the purpose of sustaining our criticism of the manner in which the case as a whole was submitted to the jury. The effect of these errors was to present the plaintiff's case to the jury in such an unfavorable light as to tend to prevent them from bringing in a verdict in the amount to which the plaintiff on the evidence was entitled. In our opinion this case presents one of the comparatively rare cases where an appellate court would be justified in setting aside the judgment on the ground that the damages were inadequate. Under the practice of taking appeals directly from the District Court of the United States for Porto Rico to the Supreme Court of the United States we assume that it is not possible to call upon the appellate court to set

aside a judgment on this ground, and accordingly we are only able to argue the effect of errors committed at the trial of the case and properly reviewable by this court.

(a) *The court erred in charging that the plaintiff and defendant never reached an agreement as to the units to be used as a basis of settlement.*

Plaintiff's fifth exception (Record, p. 151) was to that part of the charge which was worded as follows:

> "They had never reached an agreement and never did reach an agreement as to either the basis or the units which should be used in making settlements between them."
>
> (Charge of the Court, Record, p. 143.)

In view of the evidence on this point, it is difficult to conceive how the court could have permitted itself to give such an instruction.

Mr. Converse, President of the plaintiff company, testified (Record, p. 39) that on or about February 1, 1912, he went to New York and at an interview with Mr. Carlin certain unit prices were agreed on and a typewritten memorandum was given to him by Mr. Carlin at that time. This typewritten memorandum was identified and admitted in evidence as Plaintiff's Exhibit 20 (Record, p. 40). Immediately thereafter under date of February 6th, the plaintiff wrote to the defendant making requisition on the basis of the unit prices contained in the memorandum "in accordance with your instructions to Mr. Converse" (Plff's. Ex. 22, Record, p. 42). No exception to this statement nor to these figures was taken by the defendant at that time.

Mr. Carlin, however (Record, p. 92), denied that any agreement was actually arrived at as to the use of these figures as a basis.

In rebuttal Mr. Converse (Record, p. 141) reiterated his previous testimony emphatically and with additional details. The preponderance of the evidence would seem to have been in favor of plaintiff's version. In any event, there was a clear conflict in the evidence on this point and there was presented a question of fact which certainly should have been left to the jury. The attitude of the court was unjustified and the charge was unfair to the plaintiff. It denied the credibility of the President of plaintiff company who was one of plaintiff's principal witnesses and whose character and standing was never attempted to be assailed by the defendant.

(b) *The Court erred in admitting in evidence an unaccepted bid as proof of the cost of completing the work covered by plaintiff's contract.*

The plaintiff stopped work on account of the defendant's breach of contract when only a portion of it had been completed. The defendant offered in evidence a bid, made by another firm of contractors, covering the remaining work. This bid was admitted in evidence over plaintiff's objection (Record, p. 94; Deft's Ex. 65, p. 132). *This bid was not accepted by defendant* (Record, p. 94). This fact speaks for itself. There is no evidence that this bid was submitted in open competition with other bids, or that it was not the highest bid made. The witness did not testify that the amount of the bid bore any relation to the actual cost or value of the work. And yet this bid was admitted in evidence by the trial court as proof of the value of the work to be done. This was clearly error.

In *Sharp* v. *United States*, 191 U. S. 341, the admissibility of unaccepted bids as proof of value was fully discussed and it was held that the general rule

was that such bids were utterly inadmissible where the subject matter of the bid had no market value, except in extremely rare cases. In speaking of such evidence the court said (pp. 348, 349):

> "It is of a nature entirely too uncertain, shadowy and speculative to form any solid foundation for determining the value of the land which is sought to be taken in condemnation proceedings. If the offer were admissible, not only is it almost impossible to prove (if it exist) the lack of good faith in the person making the offer, but the circumstances of the parties at the time the offer was made as bearing upon the value of such offer may be very difficult, if not almost impossible to show. * * * *In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication and even dangerous in their character as evidence upon this subject.*"

In *Hine* v. *M. R. Co.*, 132 N. Y. 477, one of the cases cited by the Supreme Court in the *Sharp* case, the court, after holding that an unaccepted offer was inadmissible to prove value, said (p. 481):

> "In the few cases which may be found holding the other way the question does not seem to have received much consideration from the courts rendering the decisions."

The court cites a long line of cases in the note (p. 350) in support of the general and well settled rule that bids of this nature are not admissible to prove value.

(c) *The court erred in charging that the plaintiff company was notified on August 5th to begin the work on the granite setting.*

The plaintiff excepted to the following charge of the court (Record, p. 151, Exception No. 10):

> "Notice was given to plaintiff on August 5, 1911, to start setting granite, derricks were set up by the first week in September, and work was started on October 16th. It is for you to decide who was at fault for that delay." (Charge of the court, p. 142.)

But Mr. Follett, one of the plaintiff's witnesses, testified that the letter from the defendant to the plaintiff, ordering the plaintiff to start granite laying, came three or four weeks prior to the middle of October—"I think in September" (Record, p. 25).

The letter in which the defendant ordered the plaintiff to proceed with the work under the terms of the contract was dated September 15, 1911 (Deft's Ex. 17; Record, p. 104). It appears, therefore, by the undisputed evidence of both the plaintiff and the defendant that the defendant ordered the plaintiff to start work nearly a month and a half later than August 5th, as stated by the judge in his charge to the jury.

The plaintiff claimed that the delay of the defendant in beginning and continuing the work damaged the plaintiff and amounted to a breach of the contract. The defendant claimed that the delay was caused by the plaintiff, and the judge charged that it was for the jury to determine who was at fault for the delay. The question of whether there was a delay and if so, who was chargeable with the delay, was therefore material both on the issue of breach of the contract and on the issue of damages.

(d) *The testimony of defendant's witness, Joseph P. Carlin, admitted over plaintiff's repeated objection, was obviously hearsay and inadmissible.*

This testimony and the objections thereto are found on pages 86, 89 and 90 of the Record. It was clearly brought out that Mr. Carlin was in New York during all of the period covering the transactions in Porto Rico as to which he testified and that he was informed thereof by letter. The efforts of the court to qualify the testimony appear in the colloquy between the court and the witness on pages 86 and 87. The testimony was so clearly hearsay that argument seems superfluous. Yet the witness was allowed to go at length into transactions in Porto Rico and in fact became the defendant's principal witness. He testified, among other things, to the effect that the defendant had never failed to furnish labor and materials (in Porto Rico) under its contract and that the plaintiff had caused delay by failure to furnish labor and materials (in Porto Rico) under its contract.

(e) *The court erred in charging that the plaintiff's representative and workmen were unskilled.*

The plaintiff excepted to the part of court's charge as follows (Record, p. 151, Exception No. 2):

> "and with those men skilled only in the making of molds and forms as was also the representative of the plaintiff company at San Juan?"
>
> (Court's charge, Record, p. 142.)

This charge was unfair to the plaintiff on the evidence and a material misstatement of fact. Mr. Follett was the representative of the plaintiff company in San Juan and he was competent in all the work which the plaintiff company had contracted to do (Record p. 27). Mr. Guerini also represented the plaintiff in Porto Rico (Record, p. 25) and he was an expert in this particular line of

building (Record, p. 52). Mr. Converse, president of the plaintiff company, an experienced contractor, made three trips to Porto Rico (Record, p. 51). Not only was the charge the reverse of correct according to the evidence, but it carried the implication that the plaintiff was at fault and failed to provide competent men to carry on its work. This was not seriously contended by the defendant, and the charge was of a nature to prejudice the jury against the plaintiff.

(f) *The court erred in charging the jury that the value of the tools which were turned over to the defendant under agreement by the plaintiff was* $3,000, *and in refusing to correct this statement in accordance with the evidence.*

The court charged as follows (Record, p. 146):

> "It is evident that certain material and appliances, which were used by the plaintiff company in the carrying out of its contract, so far as it was carried out, are now, or were at one time, placed in the custody and control of the plaintiff company, and that the value of them was about $3,000, although it was not entered into in detail."

This part of the charge was properly excepted to by plaintiff (Plaintiff's Ex. 18, Record, p. 153).

The only testimony with regard to these tools was that of Mr. Follett, who testified (Record, p. 60) that $3,500 was a fair price for the tools and that of Mr. Converse (Record, p. 60), who testified that from $3,300 to $3,800 would be a fair price for the machinery.

This error of the court might be excused on the ground that it was mere inadvertence, but for the fact that the court's attention was particularly called to the point, as appears from the colloquy

between court and counsel appearing on pages 161 and 162 of the Record. It appears clearly that the court refused, after his attention was called to the point, to refer to the evidence and correct his statement and that the verdict of the jury was based definitely on the figures given to it by the court as exact. The amount involved in this particular question is small. But the plaintiff was clearly deprived by the court's error of several hundred dollars, and this in a case where the plaintiff complains that the verdict was unjustifiably small.

LASTLY.

The writ of error should be sustained, the judgment set aside, and the case remanded for a new trial.

Respectfully submitted,

EDWARD S. PAINE,
Attorney for plaintiff in error.

FILED
NOV 10 1915
JAMES D. MAHER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 78.

GUERINI STONE COMPANY,
Plaintiff-in-Error,

versus

P. J. CARLIN CONSTRUCTION COMPANY,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF OF DEFENDANT-IN-ERROR.

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No. 78.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

STATEMENT OF THE CASE OF DEFENDANT-IN-ERROR.

Defendant-in-error respectfully submits to the Court this its statement of the facts in the case, according as its counsel understands them, in order that there may be called to the attention of this Court material facts and issues which support the verdict and judgment rendered, but which have not been set forth in the statement of facts prepared and submitted by plaintiff-in-error.

In the first place, defendant calls to the attention of the Court the object and subject matter of the sub-contract which is the basis of this suit and

for the alleged violation of which damages are claimed.

It is sufficient for this purpose to set forth the following paragraphs of the sub-contract:

> "*1st.* The Sub-Contractor shall and will well and sufficiently perform and finish in a thoroughly workmanlike manner under the direction and to the satisfaction of the General Contractors and James Knox Taylor, Architect (acting as Agents of the Owner), or his or its representatives. To furnish and set in position, including the concrete backing, all the imitation of sand stone, and to construct the interior concrete walls, concrete floors, concrete roof, backing and granite construction, enclosing all the I-beams for and at the San Juan post office building, at San Juan, Porto Rico, agreeable to the drawings and specifications, made by the said architect (Copies of which have been delivered to the Sub-Contractor), and to the dimensions and explanations thereon, therein and herein contained, according to the true intent and meaning of said drawings and specifications, and of these presents, including all labor and materials incident thereto, and shall provide at his own expense all scaffolding, implements, moulds, models, hoisting and cartage necessary for the due performance of the said work or works.
>
> 7th. The Sub-Contractor shall not cause any unnecessary hindrance or delay to other contractors on said buildings and shall bear all damages done to the work of such other contractors by his employees. Should the Sub-Contractor be obstructed or delayed in the prosecution or completion of the work by neglect, delay or default of the Owner, the Architect, the General Contractors, or of any other contractors employed by them

upon the work, or by alterations which may be required in said work, or by any damages which might happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employees through no fault of the Sub-Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be made unless a claim therefor is presented in writing to the General Contractor within twenty-four hours after the occurrence of such delay. The General Contractors shall award and certify, in writing, the amount of additonal time to be allowed. The Sub-Contractor may appeal from said award to arbitrators constituted as provided in Article 3rd of this contract.

11th. The General Contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Sub-Contractor, agree that they will reimburse the Sub-Contractor for such loss; and the Sub-Contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the General Contractors shall become liable, then he shall make good to the General Contractors any such damage over and above any damage for general delay, herein otherwise provided; the amount of such loss or damage in either case, to be fixed and determined by the Architect, or by arbitration, as provided in Article 3rd in this contract.

25th. The Sub-Contractor further agrees to furnish the material and build the concrete footing complete to the basement floor for the sum of $6.70 a cubic foot.

Also to furnish the materials and build all the sidewalks for the sum of $1.85 a square yard.

> Also set in position all the granite walls, steps, balusters, buttresses and curbing, and all other granite work for the sum of 40 cents a square foot surface. The three above items to be at the option of the General Contractor. * * *"

The labor and materials to be supplied by plaintiff, and which are involved in the issues in this case, were:

> "(a) The furnishing and setting in position, including the concrete backing, all the imitation of sand stone, and to construct the interior concrete walls, concrete floors, concrete roof, backing the granite construction, enclosing all I-beams, * * *" (Sub-contract, par. 1st).
>
> "(b) To set in position all the granite walls, steps, balusters, buttresses and curbing, and all other granite work, * * *" (Sub-contract, par. 25th).

The general contractor exercised, on July 10, 1911 (Record, p. 86), the option given to it by the sub-contract to require the granite work to be done by the sub-contractor.

Plaintiff's supposed cause of action and complaint rests solely and alone upon the alleged breach of the sub-contract by defendant:

> (1) By the delay of defendant in performing the work it was under obligation to perform to the United States Government under its original contract made with the Secretary of the Treasury, *being work not included in the sub-contract with plaintiff* (Complaint, par. 7).
>
> (2) By the action of defendant in delaying plaintiff in the performance of the work

included in the sub-contract (Complaint, pars. 5 and 6).

(3) By the action of defendant in not making partial payments to plaintiff on account of the work actually performed to the amount and according to the units claimed by plaintiff (Complaint, par. 9).

The sub-contract contained and provided for within itself the rights and remedies in favor of plaintiff arising out of the delay of the general contractor; but, as we will develop in the argument, such rights and remedies were subject to and governed by the rights and remedies of the United States under this contract with the general contractor, which rights and remedies were binding upon the sub-contractor.

Paragraph 7th of the sub-contract provided the remedy for delay of the general contractor in connection with the work included in the sub-contract:

"The Sub-contractor shall not cause any unnecessary hindrance or delay to other contractors on said buildings and shall bear all damages done to the work of such other contractors by his employees. Should the Sub-Contractor be obstructed or delayed in the prosecution or completion of the work by neglect, delay or default of the Owner, the Architect, the General Contractors, or of any other contractors employed by them upon the work, or by alterations which may be required in said work, or by any damage which might happen by fire, lightning, earthquake or cyclone or by the abandonment of the work by the employees through no fault of the Sub-Contractor, *then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid.* * * *"

Paragraph 11th of the sub-contract provides for the remedy of the sub-contractor for delay relating to the providing of labor and materials *not included in the contract,* as follows:

> "The General Contractors will provide all labor and materials *not included in this contract* in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Sub-Contractor, agree that they will reimburse the Sub-Contractor for such loss. * * * "

With reference to the third alleged breach of the contract, as set forth in the complaint, viz., the alleged failure of the defendant to pay plaintiff the amounts and according to the units claimed by it—there is nothing in the sub-contract, nor any evidence offered in the case, to justify serious consideration of this point. This is very clearly explained in the testimony of defendant's witness, Joseph P. Carlin:

> "Our contract with the Government mentioned the unit items of concrete in the footings, and in the concrete walls of thirty-five and fifty cents a cubic foot. There was no other unit to be applied for concrete work that the Guerini Stone Company was to do under their contract except the units mentioned. These units applied to concrete work in the footings and walls. There was no unit for imitation sandstone either between us and the Government or between us and the Guerini Stone Company.
>
> In the sub-contract with the Guerini Stone Company it states in Art. 25 that the sub-contractor agrees to build the concrete footings complete to the basement floor for the sum of $6.70 a cubic yard, which is approximately twenty-five cents a cubic foot.

Up to the time that the Guerini Stone Company abandoned this contract no occasion had arisen for the application of any other unit except that one for the concrete work. The larger unit represented the value of the imitation sandstone for $1.07, and this had been paid to the Carlin Construction Company by the Government, because when the Carlin Construction Company made its arrangements for the payments under the contract it was agreed with Mr. Stierle, who was the Government Superintendent in consultation with the Carlins on a unit schedule of prices which would prevail throughout the entire contract; that is, the various parts of the work were separated into about twenty items, and a total given to each item, and there were units applied to each separate item, and accordingly, under this schedule, the Carlin Construction Company received $1.07 for the concrete work in the foundations. Mr. Berryman who took Mr. Stierle's place changed the basis of payment, and his payments were thereafter based on thirty-five cents a cubic foot for this class of concrete work. Accordingly, we were overpaid about $8,500.00, and it has been agreed with Mr. Berryman that this would be deducted from our next payment. Our contract unit with the Guerini Stone Company for this work is $6.70 a cubic yard and twenty-five cents a cubic foot, but I am allowing them a greater quantity than they have claimed based on their estimate of quantities, and applying the unit of forty cents which appears in our sub-contract with the plaintiff to the total amount of feet of granite set, of 3,547 square feet at forty cents gives One thousand four hundred and twenty-eight dollars and eighty cents total. From this I deduct $357.40 for cleaning and pointing because this is usual and customary and this leaves a balance for granite setting of

$1,074.10. The total amount of all the concrete that the plaintiff was to do up to the beginning of the artificial stone work I will call 23,124 cubic feet, which at the unit price of $1.07 a cubic yard gives us $5,796. Deducting for surfacing the amount of $1,159.20 leaves a balance of $4,436.80. Now deduct 15%, or $856.64 as they are only entitled to 85% payments gives a total balance of $4,854.26. There were charges against the Guerini Stone Company for supplies and the use of the derrick engineer and labor of $2,469.88.

The major part of this deducation is for the concrete work done in the area and in the approach work which they refused to do, and which we did. There was cash paid to the Guerini Stone Company in the sum of $4,439.55. On the basis of this calculation, the Guerini Stone Company has been already overpaid $2,064.43, but independent of these charges the amount to their credit would be approximately $400.00 after deducting our fifteen per cent. This has not been paid to the Guerini Stone Company because they abandoned their Contract, which gave us the right to retain any balance which was due to them. The alleged agreement as to units testified to by Mr. Converse, and now introduced as Exhibit 20 by the Plaintiff was not a contract or agreement between us. Mr. Converse came to our office and asked the basis for payments that we were using with the Government. It was required by the Government that this schedule of unit prices shall be publicly posted so that any sub-contractor shall have access to it and know what the general contractor is getting for his work. This was about February 10th. He asked me for a copy of that schedule. I asked Mr. Lovering who is here in court, and was our bookkeeper in New York, to get that for me, and he brought it into my private

office, and Mr. Converse asked if he could have a copy of it, and I said: 'You can.' I said Mr. Lovering will make a copy for you. Mr. Lovering took off the first four items, because I presume, the other items will not interest Mr. Converse as they had nothing to do with his contract. The first of these four items was for excavating and filling of which the Guerini Stone Company did none; the second was for the concrete footings and walls to the basement level, and the units are fifty and thirty-five cents per cubic foot, which is the same work for which the Guerni Stone Company claimed that they should have a unit of $1.07. Third: exterior and interior concrete walls, arches and cement work $1.07 a cubic foot. There has been interior concrete work done by the Guerini Stone Company, but if you will permit me I wish to make an explanation of the apparent discrepancy of these items with respect to the Government units. The fourth item, concrete floors and casings, unit 45½ cents per square foot. The schedule states that the concrete foundations and walls to the basement level shall be paid for at the rate of 35 cents and 50 cents a cubic foot. Item three says exterior and interior concrete walls, arches and cement work, but they don't specify where it is to start, that is, whether it is above or below the basement, that is where the difficulty presented itself to Mr. Stierle undoubtedly at that time.

Cross-examination by Counsel for Plaintiff.

The unit of $6.70 a cubic yard in the 25th paragraph of the contract between defendant and plaintiff covers work which as a matter of fact was not done by the plaintiff, but the character of the work which they did was exactly similar, which was the continuation of the basement wall. They did not do any

> work below the basement floor. *There is no unit mentioned in the contract between the Guerini Stone Company and the Carlin Construction Company for concrete work (other) than the unit of $6.70 which did not apply to any work actually done by them.* We did not exercise our option to have them build the sidewalks." (Record, pp. 90, 91 and 92.)

This very explicit and correct statement of the point relating to the units was not overcome by any evidence of plaintiff; and, as will be subsequently demonstrated in the development of this point in the argument, the Trial Court fairly submitted this issue to the jury, which in its verdict found against plaintiff.

All of the assignments of error by plaintiff, with one exception, merely represent an effort on the part of plaintiff to review the discretion and verdict of the jury upon plain matters of fact which were fairly submitted to it by the evidence in the case and by the charge and instructions given by the Court.

The single exception is the assignment based upon the action of the Court below in ruling that the sub-contractor was bound by the terms and provisions of the original contract between the United States and the general contractor, and in instructing the jury that if it believed from the evidence that any delay or inability upon the part of the general contractor in performing the sub-contract was caused by the action of the United States Government in asserting rights which it had under the original contract, plaintiff could not recover.

We respectfully insist that this is the only point open to review by this Court. If the Court below

was right in its application of the law on this point, nothing remains in the case which can be considered by the Supreme Court. If the Court below correctly interpreted the law on this point, the remaining four points urged by plaintiff in its brief fall, as do the specifications of error upon which they are based.

The verdict of the jury was a fair allowance to plaintiff of all sums to which plaintiff was entitled, and was in strict accord with the evidence in the case and the instructions of the Court in favor of plaintiff. Under the evidence and the law of the case, the jury was even generous with plaintiff.

The verdict in favor of plaintiff represented a finding on behalf of the jury that defendant was not guilty of a breach of the sub-contract. The verdict of $6,609.25 represents simply the allowance of $3,000—value of tools and machinery of plaintiff which were in the possession of defendant—and the balance the sum of money which the jury believed plaintiff to be entitled to for work and labor already furnished.

It is self-evident from the verdict that the jury found in favor of the defendant on the question of the units and damages as claimed by plaintiff.

The difference between $3,000, value of tools and machinery, and the total amount of the verdict is unmistakably the allowance made by the jury upon the evidence as the amount to which plaintiff was entitled for work and materials already supplied, without considering such claims as defendant made against plaintiff for the use of the derrick, engineer, and labor, and the sums charged for cleaning and pointing, plus the 15 per cent. withheld by defendant from plaintiff in accordance with the contract—in other words, the verdict of the jury

is a finding in favor of defendant upon the alleged breach of the contract.

The wrong done by the jury was its failure, under these circumstances, to allow any sum in favor of defendant in support of its counterclaim.

Having found, as it did, the issues in favor of defendant upon the alleged breach of the sub-contract, the jury should have complied with the XII and XIII Instruction asked for by defendant, and given by the Court, based upon the evidence of defendant as to the expense to defendant for putting in proper condition the concrete work and granite setting which plaintiff failed to do, and also as to the compensation to defendant for operation of the derricks and engine furnished by it—all of which was supported by the evidence in the case.

Brief of Argument of Defendant.

Plaintiff-in-error has grouped into five points its specifications of alleged error committed by the Court below.

Defendant-in-error will consider these points in the same order in which they appear in the brief of plaintiff-in-error.

POINT I.

It is urged by plaintiff-in-error that the Court below erred in admitting the alleged contract between the United States Government and defendant, and in instructing the jury that as to any or all delays which it might believe under the evidence resulted from the action of representatives of the Government of the United States in changing the foundations or plans of the Federal building in

question, or otherwise, the defendant was not liable therefor, and the plaintiff could not recover.

Defendant offered this contract in evidence, as well as testimony showing that the work under the original contract had been delayed or stopped by the United States Government, claiming that the plaintiff could not recover for any delay so caused.

A reference to the sub-contract discloses that for any delay by defendant in connection with the work which was included in and the subject of the sub-contract, plaintiff's only remedy was an extension of time for performance of the sub-contract, as provided in paragraph 7th thereof; therefore, plaintiff certainly was not entitled to recover money damages from defendant for any delay of the latter in connection with the supplying of concrete and imitation sandstone and the granite work, which were included in and were the subject of the sub-contract.

As to delay of the general contractor in connection with work not included in the sub-contract, defendant claimed upon the trial, and here insists, that if such delay was caused by the action of the United States authorities, in the exercise of a discretion and power reserved in the original contract, evidence of such fact was, and is, a complete defense to plaintiff's claim.

The Court left it to the jury to determine whether the delay complained of by plaintiff was caused by the United States. Upon the evidence the jury found this issue in favor of the defendant.

The original contract between defendant and the United States contained, among others, the following clause:

> "It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the

work herein contracted to be done, whenever in the opinion of the Supervising Architect it may be necessary for the purposes or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work, the same to be ascertained by the Supervising Architect; and a similar allowance of extra-time will be made for such other delays as the Supervising Architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided, further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States." (Record, p. 70.)

The sub-contract contained the following clause:

"*1st.* The Sub-Contractor shall and will well and sufficiently perform and finish in a thoroughly workmanlike manner *under the direction and to the satisfaction of the General Contractors and James Knox Taylor, Architect (acting as Agents of the Owner) or his, or its representative.* To furnish and set in position, including the concrete backing, all the imitation of sand-stone, and to construct the interior concrete walls, concrete floors, concrete roof, backing the granite construction, enclosing all the I beams for and at the San Juan post-office building, at San Juan, Porto Rico, *agreeable to the drawings and specifications, made*

> *by the said Architect (Copies of which have been delivered to the Sub-Contractor), and to the dimensions and explanations thereon, therein and herein contained, according to the true intent and meanig of said drawings and specifications, and of these presents,* including all labor and materials incident thereto, and shall provide, at his own expense, all scaffolding, implements, moulds, models, hoisting and cartage necessary for the due performance of said work or works." (Record, p. 18.)

It is clearly established by the evidence that all the delay in the performance of the work not included in the sub-contract was caused by the United States Government, through its subordinates, because of the necessity of modifying the character of the foundations of the building as they were originally planned and provided for by the Government.

There is absolutely no evidence of any delay in any other work not included in the sub-contract.

Defendant does not pretend, nor did the Court below imply in its rulings upon this point, that:

> "the fact that the United States Government, instead of an individual, was a party to the main contract cannot alter the ordinary rules of contract rights and obligations."

nor is it pretended that there is:

> "any such magic in the Government's name."

It is familiar law that:

> "when the Government voluntarily goes into the business of building construction and makes contracts with private individuals, the ordinary laws of contracts must apply."

These well-known principles are not controverted, but they are not involved in, nor applicable to, the present case. There is no question herein of the Government's asserting, or attempting to assert, as against either the general contractor or the sub-contractor, any arbitrary right inconsistent with the contract it made with the general contractor. Plaintiff has not attempted to question the right of the United States to enforce the provision of its contract with the general contractor above quoted authorizing the stoppage or suspension of the work, but plaintiff contends that such provisions can be asserted against the general contractor, but not against the sub-contractor.

In other words, the position of the plaintiff is that when the United States Government orders the general contractor to stop or suspend the work, the sub-contractor may compel the general contractor to continue the same, or that else the general contractor will be liable for damages for failure to perform work which by his contract with the Government he would be physically and legally unable to perform.

Whatever may be the obligations of the general Government in contracts which it makes with private individuals, no question can be made of the propriety and validity of the stipulation in the original contract reserving the right to stop or suspend the work. This right was not only agreed to by the general contractor, but it was imposed upon both parties to the contract by public policy.

Provisions of this kind affecting the rights and powers of the Government or owner must necessarily be held to be accepted by sub-contractors undertaking with the general contractor to perform any part of the work. Common prudence and experience compels the assumption that the sub-con-

tractor had knowledge of the terms and provisions of the original contract. The law will certainly presume such knowledge. A sub-contractor stands in the place of the general contractor. The very purpose of the sub-contract is to carry out, to the best ability and advantage possible, the obligations and conditions assumed by the general contractor. In every case of a sub-contract the consideration and basis therefor is, and must necessarily be, the original contract:

> "A sub-contractor is an *under-contractor*—one who takes under the original contract and is to perform in accordance with the original contract; * * *"
>
> *Am. & Eng. Ency. of Law*, Vol. 27, p. 193. See, also, Webster's and Worcester's dictionaries, defining the words "*sub-contract*" and "*sub-contractor.*"

In Porto Rico, where this brief was prepared, it has been impossible to find a reference or citation to Federal or State cases in support of our contention, but we confidently assert that the principle must be of general and universal acceptance.

The evidence of defendant was convincing and uncontradicted that the only delay in the performance of *all* the work to be done by defendant, including that provided for in the sub-contract as well as that not included therein, was caused by the action of the agents of the Government, exercising the valid discretion reserved to them by the original contract. How this happened was briefly and succinctly stated by defendant's witness *Joseph P. Carlin*, as follows:

> "Changes were made in the foundations with respect to thickness, width and heighth, and also in the reinforcement to be used.

"On March 9th (1911) we received a telegram from the Department of War stating that they had been notified from Porto Rico that radical changes had been made in the foundations, that an investigation was being made, and that until a report was had from the investigation, no more work was to go forward at San Juan. As a result of negotiations with the authorities in Washington, it was agreed that changes should be made in the foundations in order to obviate the difficulties which had arisen, and that responsibility for these difficulties should be determined later. The Government agreed to pay us a certain additional sum for doing the work of changing the foundations.

"It was discovered that there was a layer of soft mud, or manglares, underneath a portion of the sub-soil, which did not appear in the original boring. The P. J. Carlin Construction Company has nothing to do with the original boring. Accordingly, the type of the foundation was again changed, and the Government made plans and specifications carried to rock at every point by the use of concrete on the north half, and the balance on the south half" (Record, p. 87).

This witness testified further:

"When the piling as called for in the original specifications was omitted, a spread-footing type of foundation was found necessary to take its place. The usual proceeding is for the Government to make a plan showing the changes, but when the piles were omitted, no plans were ever made by the Government to indicate how a new type of foundation should be put in, but the Government indicated to Mr. Stierle, the then Federal Inspector, that he was to use his own judgment. Mr. Stierle made the daily changes which became necessary to place a type of foundation to replace the piles, and

in so placing the foundations under Mr. Stierle's instructions, there were variations from the original plans and specifications. These plans were entirely set aside and new plans and specifications made necessary later when the information was obtained as to the condition of the sub-soil. We made a proposal to the Government to do the work necessitated by this last change in the foundations, and an arrangement was finally arrived at whereby the Government paid us a certain sum of money, not to exceed $40,000, for this work, the Government reserving the right to fix the responsibility for the failure of the foundations later. The foundations were completed up to the basement level ready for the structure above that about the 25th or 28th of July, 1911. This delay was caused because of the change which was made from the original plans and specifications, which called for a pile foundation in the lower half of the building, which was subsequently changed by the Government in May, 1911, to spread-footing foundations and the piles were omitted and we made a request for their omission at that time. The desire to omit these piles was first made known about January 25th to January 28th, 1911, and the actual order for their omission was not received until about May 13th, 1911. This delayed the execution of the work. I should say that the actual work of beginning these foundations was started in February and completed in July, and I should judge with Mr. Converse that it should not take more than three or four months to put in all of these foundations, but it did take six" (Record, p. 89).

EXHIBIT "25" FOR DEFENDANT (Record, p. 107) is a communication from the supervising architect to the superintendent of construction at San Juan, under date of May 17, 1911, referring to changes in the foundations.

EXHIBIT "42" FOR DEFENDANT (Record, p. 118) is a communication addressed by the Assistant Secretary of the Treasury to defendant, March 30, 1912, stopping all work

> "pending the settlement of the responsibility for the deviations in the contract requirements regarding foundations."

EXHIBIT "44" FOR DEFENDANT (Record, p. 119) is a communication from the Assistant Secretary of the Treasury to defendant, dated April 16, 1912, containing a cabled report from the local representative as to the result of the new borings made. This communication says, of this report:

> "This changes conditions, and it is probable that extensive modifications will have to be made in the foundations, which, however, cannot be determined positively until the report of Supt. Berryman is received and all the details fully considered. This condition of affairs will make it inadvisable for you to resume building operations until further instructions can be given you."

The Government accepted the proposition of the defendant for the execution of the new work of underpinning found to be necessary, agreeing to pay therefor the sum of $36,000.

See DEFENDANT'S EXHIBIT NO. 48 (Record, pp. 121-127).

EXHIBIT "53" FOR DEFENDANT is a cablegram addressed by Superintendent Heald, the local inspector of the Government, to the Supervising Architect of the Treasury at Washington, March 20, 1912. It reads as follows:

"Examination San Juan foundations slow. Will complete this week. Can reach good soil 1-3 feet below present footings North wall and columns. Believe all walls can be underpinned. Possibly some interior footings must be rebuilt, but this is not difficult. No notice to sureties possible until examination completed. Carlin's statement to you regarding arbitrary changes in footings by Stierle's orders confirmed by Stierle. *Office has no ground for action against Contractors and must probably assume responsibility for changes and necessary extensive repairs.* Not possible to complete plans until conference in Washington. Expect to sail 27th. Letter."

The only scrap of evidence of which plaintiff avails itself is the testimony of Mr. Berryman, the local Superintendent of Construction, who testified as to the variations in the foundations (Record, p. 56), but there is nothing in this testimony which puts upon defendant the responsibility for such changes and the delay occasioned thereby.

In view of the clear and uncontradicted evidence to the effect that the only delay was caused by the Government, the instruction given by the Court, and to which error is assigned in Point I of plaintiff's brief, was an admirable statement of the law applicable.

This instruction was:

"The Court instructs the jury, as a matter of law, that the defendant is not liable to the plaintiff for any delay in the execution by it of either its contract with the Government of the United States or its sub-contract with the plaintiff which results from the action of the Government of the United States, or its authorized representatives.

> Therefore, the Court instructs you that as to any or all delays which you may believe under the evidence resulted from the action of the representatives of the Government of the United States in changing the foundations or plans of the Federal building in question, or otherwise, the defendant is not liable therefor and the plaintiff cannot recover."

As explained above in the *preliminary statement*, the jury found this issue in favor of defendant, since the claim made by plaintiff for alleged damages suffered was not considered.

In its complaint plaintiff claimed the sum of $45,693.32 as alleged damages caused by delay. Plaintiff has fallen into a serious error in its brief in alleging (Brief, p. 29) that the verdict in favor of plaintiff

> "itself determines the proposition that the contract was broken by defendant."

The facts do not justify this assertion. The cases cited by plaintiff-in-error in its brief in support of its *Point No. 1* are not applicable to the present case.

Defendant confidently asserts that the ruling of the Court below as to plaintiff's being bound by the original contract was correct in law, and the jury found, as a matter of fact, that the delay complained of by plaintiff was caused by the United States Government, and consequently allowed no damages to plaintiff by reason thereof.

POINT II.

Plaintiff assigns as error the action of the Court below in charging that prospective future profits could not be recovered.

Whether or not the Court erred in this connection is immaterial, since the jury found that defendant had not violated the contract, and therefore there was no occasion to consider the alleged future profits.

POINT III.

Plaintiff assigns as error the action of the Court in charging that there was no testimony to the effect that defendant constructed the foundations improperly.

In view of the overwhelming and uncontradicted testimony of defendant which establishes the fact that the defect in the foundations was the result of erroneous borings and specifications of the Government, and that the delay in the construction of the building resulted from this fact *alone*, which is clearly shown by the references which we made to the testimony under POINT I, there is no basis for complaint on the part of plaintiff.

The charge of the Court that:

> "There is no allegation, nor was there any testimony, that the work of underpinning this building in a safe way was proceeded with in any wrong manner or with any unnecessary delay"

was entirely justified by the evidence. Plaintiff cannot cite any evidence to contradict this charge of the Court. But, notwithstanding this broad

statement by the Court, it really and finally left this point open for determination by the jury.

In the FOURTH INSTRUCTION requested by defendant, and given by the Court, the jury were instructed:

> "If you should find under the evidence that there was delay in the execution of the contract which was not caused by the Government of the United States, then you are instructed that defendant is not liable for any such delay unless it results from its failure to provide labor and materials other than provided in the sub-contract" (Record, p. 148).

In the EIGHTH INSTRUCTION requested by defendant, and granted by the Court, the jury was charged:

> "The Court instructs the jury that under the terms and conditions of the 7th paragraph of the sub-contract between plaintiff and defendant the former is not entitled to recover damages or money compensation from defendant, even though it should appear from the evidence that plaintiff was obstructed or delayed in the prosecution or completion of the work by the neglect, delay or default of the Government of the United States, the Supervising Architect, or his representatives, or by defendant, or by alterations required in the work, since by the provisions of the said paragraph the only remedy for plaintiff in such cases is the time-allowance therein provided for, unless, however, you should believe from the evidence that the defendant failed to provide labor and material not included in the sub-contract in such manner as to delay the material progress of the work" (Record, p. 149).

These two instructions were liberal and fair to plaintiff, as they really left to the jury the determination as to whether or not defendant was guilty of any delay in connection with the foundations or any other part of the work.

POINT IV.

Plaintiff assigns as error the action of the Court in charging that the defendant could not be liable for money damages for delay in furnishing the granite, or for delays other than failure to provide labor and material.

In the first place, the *sub-contract itself* provided the remedy for delay in furnishing material or labor included in the sub-contract. This remedy was, as provided in *paragraph 7th* of the said sub-contract, an extension of time.

Notwithstanding this plain provision of the sub-contract which it had made and entered into with defendant, plaintiff sought to recover money damages.

The Court was liberal in its submission of this issue to the jury, inasmuch as it left to the latter by the instructions referred to in Point III even to allow money damages if it found that defendant was responsible for the delay.

As the jury found by its verdict that defendant had not committed any breach of the contract, by causing delay or otherwise, and no damages were awarded plaintiff on that account, it is apparent that plaintiff was not prejudiced. On the contrary, it was treated with the utmost liberality by the Court in submitting in the alleged claim for damages, claimed to have resulted from the delay in furnishing granite, or for delays other than failure to provide labor and material.

POINT V.

Under this point, plaintiff-in-error assigns six sub-points or specifications.

Defendant-in-error does not consider it necessary or material to discuss these specifications, since the action of the Court with respect thereto could not have prejudiced plaintiff, in view of the action of the Court and the finding of the jury on the other points hereinabove discussed.

Sub-Point (a) charges:

> "The Court erred in charging that the plaintiff and defendant never reached an agreement as to the unit to be used as a basis of settlement."

The uncontradicted evidence justified this charge. Furthermore, as set forth in the preliminary statement herein, no specific allegation is contained in the complaint to serve as a basis for recovery on this ground.

Sub-Point (b) charges:

> "The Court erred in admitting in evidence an unaccepted bid as proof of the cost of completing the work covered by plaintiff's contract."

The action of the Court in this regard was absolutely immaterial, because this evidence was offered and admitted for the purpose of proving damages in support of defendant's counterclaim.

But as the jury failed to take into consideration the counterclaim of defendant, and the evidence in support thereof, certainly plaintiff has not been prejudiced.

In Sub-Point (c) plaintiff avers:

> "The Court erred in charging that the plaintiff company was notified on August 5 to begin the work on the granite setting."

This is a mere detail, the propriety or impropriety of which is not material in view of the general manner in which the Court left the jury to determine who was at fault for the delay.

The jury was left to consider all the facts in issue, and its finding cannot be reviewed in this connection.

Sub-Point (d) is based upon the admission of the testimony of defendant's witness, Joseph P. Carlin. Said testimony appears on pages 86, 89 and 90 of the Record.

It is apparent from a most casual reading of this evidence that it was properly admitted, Mr. Carlin being the accredited superior officer of defendant company and familiar with all of the matters concerning which he testified.

Sub-Point (e) is based upon a portion of the charge of the Court to the effect that plaintiff's representatives and workmen were unskilled.

This was a detail of slight importance, which caused absolutely no prejudice to plaintiff and which was overcome by the general manner in which the Court left this issue to the jury.

Sub-Point (f) is based upon the alleged error of the Court in charging the jury that the value of the tools which were turned over to the defendant under agreement by plaintiff was $3,000.

It is true that Mr. Follett, for the plaintiff, testified that $3,500 was a fair price for the tools, and that Mr. Converse testified that from $3,300 to $3,800 would be a fair price; but this evidence all went to the jury, and as it was allowed ample

opportunity by the Court in the findings of facts no complaint is justified on this score.

As we have said above, all the assignments of error of plaintiff, with one exception, are based upon an attempt to review the discretion and action of the jury in its findings of fact.

No argument or citation of authority in support of the elementary proposition that the Supreme Court of the United States will not review findings of fact by juries.

As to the one legal point the review of which is properly within the power of this Court, we earnestly and confidently assert that the Court below committed no error.

Plaintiff is in no position to complain. The issues in the case were fairly submitted to the jury by the Court, and by the jury clearly found against plaintiff. Notwithstanding that by the verdict the jury found defendant to be without fault, it failed to consider, as it should have done, defendant's counterclaim, which was supported by evidence and by the instructions of the Court.

Defendant's Exhibits 26, 27, 28, 29, 30, 33, 36, 37, 38 and 39 clearly and effectively show that so far from defendant being at fault for the delay for work included in sub-contract, it was the plaintiff, and that as a result of this conduct of plaintiff defendant suffered serious and substantial loss.

The Court granted the THIRTEENTH INSTRUCTION requested by defendant, as follows:

> "The Court instructs the jury that, under the sub-contract, defendant is entitled to a reasonable allowance as compensation for the operation of the derricks and engine furnished by defendant to plaintiff; and defendant had a right to deduct such expenses

from the payments to which plaintiff was entitled for work done by it, if you find that any was due.

There is no evidence to contradict the testimony of defendant as to the reasonableness of the compensation in this respect, and you shall allow the same as a deduction against the amounts for which plaintiff requested payment."

According to the testimony of Mr. Joseph P. Carlin, for the defendant, these charges amounted to $2,469.88 (Record, p. 91).

On the whole, therefore, an analysis of the Record will disclose that plaintiff is without cause for complaint, and that the action of the Court below and the jury is not subject to review.

Defendant-in-error respectfully prays that the judgment of the Court below be affirmed.

Respectfully submitted,

F. H. DEXTER,
Attorney for Defendant-in-Error.

GUERINI STONE CO. *v.* P. J. CARLIN CONSTRUCTION CO.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 78. Argued November 12, 1915.—Decided February 21, 1916.

In the case of sub-contracts, as in other cases of written agreements, a reference to an extraneous writing for a particular purpose makes it a part of the agreement for that purpose only.

In this case, *held* that the general contract between the Government and the contractor was not admissible as against a sub-contractor except for the specific purpose mentioned in the subcontract, to wit; showing what drawings and specifications were referred to therein, nor was the sub-contractor bound by provisions in the general contract so as to be obliged to submit to delays resulting from the action of the Government permitted by the original contract.

Where a contractor agrees with a sub-contractor to provide labor and materials not included in the sub-contract he assumes an obligation not conditioned on the question of his fault; and whether the delay in supplying such labor and materials be attributable to him or to the exercise by the owner of a right reserved by the principal contract, he remains liable under the sub-contract.

In this case *held* that although the principal contract between the Government and the contractor gave the Government the right to suspend, as the contractor had not safeguarded himself by incorporating that provision into the sub-contract, he was not relieved from the damages caused the sub-contractor by such suspension.

In estimating profits that might be realized if a building contract had been proceeded with in the ordinary manner to completion, no more definite and certain method can be adopted than to deduct from the contract price the probable cost of furnishing the materials and doing the work.

A provision in a sub-contract requiring the contractor to make monthly payments not exceeding 85% of cost of work erected cannot be construed to require precisely that percentage; nor can a provision that the sub-contractor furnish requisitions of the amount to be paid make the sub-contractor sole judge of the amount it is en-

titled to receive. Such provisions must receive reasonable construction.

Where the form of a request to instruct is such that compliance with it might mislead the jury, there is no error in refusing it.

THE facts, which involve the rights and liabilities of a sub-contractor on government work, are stated in the opinion.

Mr. Edward S. Paine for plaintiff in error.

Mr. Francis H. Dexter for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

We have here under review a judgment for damages in favor of plaintiff in error (also plaintiff below) against defendant in error (also defendant below), reversal being asked upon the ground that, through erroneous rulings made by the trial judge, the recovery was unduly limited. The writ of error was sued out under § 244, Jud. Code (act of March 3, 1911, c. 231; 36 Stat. 1087, 1157), prior to the act of January 28, 1915 (38 Stat. 804, c. 22, §§ 3 and 6).

Defendant, a corporation of the State of New York, on December 12, 1910, secured a contract with the Government of the United States for the construction of a post-office and court building at San Juan, Porto Rico. A few days later it entered into a sub-contract in writing with one Guerini, by the first paragraph of which he agreed: "To furnish and set in position, including the concrete backing, all the imitation of sandstone, and to construct the interior concrete walls, concrete floors, concrete roof, backing the granite construction, enclosing all the I beams . . . agreeable to the drawings and specifications made by the said architect (copies of which have been delivered to the Sub-Contractor), and to the dimensions and explanations thereon, therein and herein

contained, according to the true intent and meaning of said drawings and specifications," etc.; it being agreed that the work should be done "under the direction and to the satisfaction of the General Contractors and James Knox Taylor, Architect (acting as Agents of the Owner) or his, or its representative."

A subsequent paragraph reads as follows:

"25th. The Sub-Contractor further agrees to furnish the material and build the concrete footing complete to the basement floor for the sum of $6.70 a cubic foot.

"Also to furnish the materials and build all the sidewalks for the sum of $1.85 a square yard.

"Also set in position all the granite walls, steps, balusters, buttresses and curbing, and all other granite work for the sum of 40 cents a square foot surface. The three above items to be at the option of the general contractor. . . ."

Thereafter the plaintiff corporation was formed under the laws of Massachusetts, and Guerini transferred the contract to it. Defendant was notified of this, expressed satisfaction in writing under date February 20, 1911, and thereafter dealt with plaintiff as sub-contractor.

At a later time, defendant exercised the third only of the options given to it by the twenty-fifth paragraph.

The plan of the building contemplated a foundation of concrete and piles, which was to be constructed by defendant complete to the basement floor; above this a basement story, surfaced with granite blocks to be furnished by defendant (as a practical matter, to be sent from the United States) and to be set in position by plaintiff under the accepted option. The blocks were to be backed with concrete, to be furnished and set by plaintiff. Above the basement story, the exterior walls were to be faced with imitation sandstone, backed with concrete, which together with interior walls, floors, and roof of concrete were to be constructed by plaintiff.

The contract contained the following clauses that bear upon the matters in dispute:

"6th. The Sub-Contractor shall and will proceed with the said work and every part and detail thereof in a prompt and diligent manner, . . . and shall and will wholly finish the said work according to the said drawings and specifications and this contract in 300 days from the date upon which the building is ready to receive his work and after he has been notified to proceed by General Contractors, and in default thereof, the Sub-Contractor shall pay the General Contractors the sum of twenty dollars for every day thereafter that the said work shall remain unfinished as and for liquidated damages. The Sub-Contractor further agrees to begin work at the building within three days from the time that he is notified by the General Contractors that the building is ready to receive such work.

"7th. . . . Should the Sub-Contractor be obstructed or delayed in the prosecution or completion of the work by neglect, delay or default of the Owner, the Architect, the General Contractors, or of any other contractors employed by them upon the work, or by alterations which may be required in said work, or by any damages which might happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employees through no fault of the Sub-Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid," etc.

"11th. The General Contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Sub-Contractor, agree that they will reimburse the Sub-Contractor for such loss; and the Sub-Contractor agrees that if he shall delay the material progress of the work so

as to cause any damage for which the General Contractors shall become liable, then he shall make good to the General Contractors any such damage over and above any damage for general delay, herein otherwise provided; the amount of such loss or damage in either case, to be fixed and determined by the Architect, or by arbitration, as provided in Article 3rd in this contract.

"12th. It is hereby mutually agreed by the parties hereto that the sum to be paid by the General Contractors to the Sub-Contractor for said work and materials shall be sixty-four thousand seven hundred and fifty dollars ($64,750.00) subject to additions or deductions as hereinbefore provided, and that such sum shall be paid in current funds by the General Contractors to the Sub-Contractor in monthly payments on account, not to exceed in amount 85 per cent. of the cost of the work actually erected in the building, provided that the Sub-Contractor furnishes to the General Contractors a written requisition, on a form to be supplied by the General Contractors, not less than twelve days before payment is required, . . . "

The action was commenced in June, 1912. The complaint, besides the jurisdictional averments, alleged the making of the contract between Guerini and defendant, the assignment to plaintiff and defendant's consent and recognition of plaintiff as the contracting party; averred that thereafter and during the month of February, 1911, at defendant's request and in pursuance of the terms of the contract, plaintiff employed and sent to Porto Rico its representatives, brought laborers from the United States and employed others in Porto Rico, organized its working forces, purchased and supplied the necessary tools and materials, and prepared itself and was ready and willing to perform its obligations under the contract, but that thereafter until the sixteenth day of October, 1911, plaintiff was not permitted by defendant to proceed with the work, owing to defendant's failure to provide the neces-

sary granite blocks; that on that day plaintiff did proceed with all possible diligence and performed all the work provided for by the contract as fast as defendant in the course of construction work permitted plaintiff to do so; that nevertheless during the period from October 16, 1911, until March 9, 1912, the work was unreasonably and unjustifiably delayed by the failure of defendant to provide necessary materials and carry on its part of the construction work so as to permit plaintiff to perform the work required of it under the contract, and that plaintiff was thereby greatly damaged; that on March 9, 1912, all work of every nature was stopped on the building, and plaintiff was prevented by defendant from continuing with any work; that said stoppage "has continued ever since, is still continuing, and . . . will continue for a period of at least several months hereafter," and that defendant has accordingly committed a breach of its obligations under the contract, the result of which has been and is to cause great damage and loss to plaintiff, which has been obliged to keep its labor force on hand during all of said period at great loss and expense; that by the terms of the contract payment of not more than 85% of the amount of the work actually done was due and payable by defendant monthly on 12 days' notice from plaintiff to defendant, and that plaintiff during the months of December, 1911, and January and February, 1912, duly notified and demanded of defendant payment of the sums due for the work actually performed, but that defendant continuously and repeatedly failed and refused to make said payments; that because of said repeated violation and breach of the contract on the part of defendant, plaintiff, under date of May 22, 1912, notified defendant in writing of its election to terminate the contract and bring its action for damages for breach thereof; and that plaintiff has offered to defendant to arbitrate their differences, but that defendant has refused. Plaintiff claimed damages to the amount of

$45,797.45 for work and labor performed, materials furnished, and moneys expended in and about the performance of the contract, and for lost profits. In a separate paragraph an indebtedness of about $40,000 was alleged, for the reasonable value of work, labor, and materials supplied.

Defendant answered, admitting some of the averments of the complaint, but denying that plaintiff had complied with the terms of the contract or had been prevented by defendant from proceeding with and carrying on its work; admitting that plaintiff notified defendant of its election to cancel or rescind the contract and bring its action for damages for the alleged breach thereof, but denying that there was cause for rescission, and denying that plaintiff had sustained damages as claimed by it. The answer further set up that the sub-contract was subject to all the terms and conditions of the principal contract made between defendant and the Government of the United States; that defendant had at all times proceeded strictly in accordance with the terms and conditions of the latter contract, that during the course of the construction of the building the representatives of the Government found it desirable or necessary to change the manner of constructing the foundations, and that this action of the Government was within its rights under the original contract, and plaintiff was bound thereby equally with defendant.

The case was tried before the judge of the District Court and a jury. Plaintiff introduced evidence tending to support the material averments of its complaint. It appeared that in January, 1911, defendant notified plaintiff's predecessor that "work must start at once," and that in February plaintiff sent its representatives to Porto Rico; that upon their arrival so little work had been done upon the foundations that they were unable to do anything upon the building itself, but preliminary work was done in the way of getting tools and machinery to the Island, building

workshops and an office, and preparing moulds for the casting of the artificial stone; that during the spring and summer delay was occasioned by the failure of defendant to construct the foundations; that this continued until about the first week in October, when the foundation work and the grading inside the foundation walls had proceeded to a point that would admit of the commencement of the course of granite, and enough granite was upon the ground to allow a start to be made of setting it. In August or September plaintiff was notified of defendant's acceptance of the option to call upon plaintiff to set the granite at 40 cents per square foot, but the granite was slow in arriving, and some of the stones were misfits, so that the work of laying was considerably interrupted. There was difficulty also with the derrick equipment, defendant having under the contract furnished two derricks and an engine, but with insufficient power to admit of operating both derricks at the same time. This was remedied, some time in December, by the provision of additional power. The granite setting proceeded from the middle of October to February 12, 1912, plaintiff's evidence being to the effect that it was set as fast as delivered, but that because the granite came in separate shipments, a little at a time, sometimes with needed blocks missing, the work of setting it could not be speeded. On or about February 12, 1912, plaintiff stopped setting granite, with defendant's consent.

The evidence tended to show that much of the delay during the spring and summer of 1911 was occasioned by a change made by arrangement between defendant and the Government in the provisions of the general contract respecting the mode of constructing the foundations. The pleader would seem to have limited the complaint respecting delay prior to October 16, 1911, to such as was due to defendant's failure to provide granite blocks, but the evidence was not thus limited.

In February, 1912, when the granite work had been

practically finished, it was ascertained that the foundations had settled, and that there were variations in the foundation work from the specifications as agreed upon between the Government and defendant. On March 9 work was suspended by order of the Government, pending an investigation which resulted in showing that practically the entire building would have to be underpinned in order to secure a safe foundation. This result was officially communicated to defendant under date March 25, 1912, and a few days later, pursuant to an order of the Assistant Secretary of the Treasury, all work upon the building was stopped "pending the settlement of responsibility for deviations from contract requirements regarding foundations." The question of responsibility lay between defendant and the representatives of the Government; plaintiff having had nothing to do with the foundations. Leaving the question undetermined, the Government, in the month of May, 1912, entered into an agreement with defendant for underpinning the entire building. It perhaps does not clearly appear when this work was commenced, but it was in progress when the action was begun, and Mr. Berryman, the Government's superintendent of construction then in charge of the building, testified: "This work is now [November, 1912] about 85 per cent. completed." The same witness testified that from March 9, 1912, until the time of the trial, "conditions were such that it was impossible for the Guerini Stone Company to continue with their work under the contract."

On March 9, 1912, plaintiff's agent at San Juan was notified by defendant's representative there that the Federal authorities had ordered all work upon the building suspended pending investigation of the foundations. On the same day he wrote defendant's San Juan office asking whether plaintiff's men should be discharged and sent back to the United States, but got no satisfactory reply. Further correspondence upon the same topic led to no result.

Meanwhile, the parties had been in disagreement about payments on account. The contract (paragraph 12) provided for payment of the contract price "in monthly payments on account, not to exceed in amount 85 per cent. of the cost of the work actually erected in the building, provided that the Sub-Contractor furnishes to the General Contractors a written requisition, on a form to be supplied by the General Contractors, not less than twelve days before payment is required," etc. The contract, however, did not provide how the cost of the work other than the granite setting should be ascertained. For the concrete backing and other concrete work and the imitation sand-stone covered by the sub-contract, no "unit prices" were specified. The price of "6.70 a cubic foot," mentioned in the twenty-fifth paragraph as the optional price for concrete footings, was treated by the parties as if intended to read $6.70 per cubic *yard*—approximately 25 cents per cubic foot. This, however, had reference to work that plaintiff was not called upon to do, and obviously did not furnish a unit price for the concreting actually done by plaintiff.

In December, 1911, and January, 1912, plaintiff made written requisitions for payments on account, based upon statements of the "amount of work completed to date." They were not complied with, and the parties soon realized the practical importance of agreeing upon a unit price to be employed in estimating the amounts payable. According to the testimony of Mr. Converse, President and Treasurer of the Guerini Company, he went from Boston to New York City on February 2, 1912, by appointment, and conferred with Mr. Carlin, defendant's representative, upon the subject of unit prices, and it was then agreed that plaintiff should make its applications and receive its payments upon the basis of a certain written schedule of units, produced by Mr. Carlin, which specified (*inter alia*): "Exterior and interior concrete walls, arches and cement

work, $1.07 per cu. ft.; Concrete floors and casings, 45½c per sq. ft." Mr. Carlin, in his testimony, denied that such an agreement was made, but admitted that the schedule had been agreed upon between defendant and the Government's superintendent of construction and used as a basis for payments by the Government to defendant, including payments for the work done by plaintiff under the sub-contract. At the interview of February 2, Mr. Converse received a check for $3,765.50 on account, as against $12,750.00 previously called for. Under date of March 9th a requisition for $11,735.95 was made, and against this a payment of $674.00 was made about two weeks thereafter. No other payments were made to plaintiff. It appeared, however, that for the work theretofore done by plaintiff, defendant had received from the Government at least $13,871.25 (a witness called by defendant said "about $19,000"), based upon the price of $1.07 per cubic foot for concrete. It was explained that this unit price was fixed by the first superintendent of construction, who had charge during the year 1911 and the first month of the following year, and that his successor, who took charge on February 1, 1912, employed a lower unit price, on the basis of which the Carlin Co. had been overpaid about $8,000.

Enough has been said to indicate the situation as it stood on May 22, 1912, on which date plaintiff wrote to defendant reciting briefly its complaints respecting defendant's previous conduct and the stoppage of the work and concluding as follows:

"Under these circumstances and owing to your entire failure to comply with the terms of the contract, we hereby notify you that we now terminate the contract and shall proceed no further with the work, and that we shall hold you liable for damages we have sustained by reason of your breach of contract, including your failure to provide labor and materials not included in the contract with

us in such manner as not to delay the material progress of our work and your failure to make payments in accordance with the terms of the contract, and all other breaches of contract on your part."

Defendant acknowledged receipt and replied May 31, 1912: "Said letter is a breach of contract on your part, and we shall immediately proceed to have the work done by other parties, and shall charge you with the additional expense, if any, above your contract price."

Plaintiff further produced evidence tending to show that the moneys expended by it in and about the performance of the contract amounted to upwards of $30,000; that if permitted to complete the contract under ordinary conditions, its estimated profits would have been about $9,700; and that defendant had taken over machinery, tools, etc., belonging to plaintiff estimated to be worth from $3,300 to $3,800.

Defendant to some extent disputed the facts recounted in and inferable from plaintiff's evidence, but based its defense principally upon the provisions of the contract between defendant and the Government, which it was insisted must be read into the contract between plaintiff and defendant. Among those provisions was this:

"It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the Supervising Architect it may be necessary for the purposes or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work, the same to be ascertained by the

Supervising Architect; and a similar allowance of extra time will be made for such other delays as the Supervising Architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided, further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States."

And among the "General Conditions" prefacing the specifications was this:

"The Department, acting for the United States, reserves the right to suspend any portion of the work embraced in the contract whenever, in its opinion, it would be inexpedient to carry on said work."

Other contentions were made which are not now material.

The jury rendered a verdict somewhat special in form, finding for the plaintiff and assessing its damages at $6,609.25, "including the value of tools inventoried at $3,000." The judge had instructed them that for certain material and appliances used by plaintiff in carrying out its contract, and which were placed in the custody and charge of defendant, "credit must be given, in whatever decision you arrive at, to the plaintiff company, and in the uncontradicted sum of $3,000." Just how the residue of the verdict was made up we have no means of determining, nor is it now important.

The chief controversy here is over the admission in evidence of the general contract, and the effect given to it in the rulings of the trial judge, which were in substance that the provisions of that contract, including those above quoted, were to be read into the sub-contract, and that for any delays which resulted from the action of the representatives of the Government in changing the foundations or plans of the building, in suspending or stopping the work, or otherwise, defendant was not

responsible to plaintiff. To these rulings exceptions were duly taken.

From what was said by the trial judge it would seem that he labored under the impression that the Supervising Architect of the Treasury was a party to the sub-contract. This is not the case; he did not sign the agreement, and his name was inserted solely in the capacity of architect or referee. And although the sub-contract very plainly imports that it covers only a part of the work of constructing the building, and that the Carlin Company was the general contractor, it contains no clause incorporating into itself the provisions of the principal contract, or even in terms referring to that instrument. The sub-contractor's work was agreed to be done according to drawings and specifications, "copies of which have been delivered to the subcontractor." These copies were not produced, nor was their non-production accounted for. The parties seem to have assumed that the drawings and specifications of which copies were to have been delivered with the sub-contract were identical with those that formed a part of the general contract; and we adopt that assumption.

The reference in the sub-contract to the drawings and specifications was evidently for the mere purpose of indicating what work was to be done, and in what manner done, by the sub-contractor. Notwithstanding occasional expressions of a different view (see *Shaw* v. *First Baptist Church*, 44 Minnesota, 22, 24; *Avery* v. *Supervisors*, 71 Michigan, 538, 546, 547; *Stein* v. *McCarthy*, 120 Wisconsin, 288, 295), in our opinion the true rule, based upon sound reason and supported by the greater weight of authority, is that in the case of sub-contracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified. *Woodruff* v. *Hough*, 91 U. S.

596, 602; *Neuval* v. *Cowell*, 36 California, 648, 650; *Mannix* v. *Tryon*, 152 California, 31, 39; *Moreing* v. *Weber*, 3 Cal. App. 14, 20; *Short* v. *Van Dyke*, 50 Minnesota, 286, 289; *Noyes* v. *Butler Bros.*, 98 Minnesota, 448, 450; *Modern Steel Co.* v. *English Construction Co.*, 129 Wisconsin, 31, 40, 41.

In the present case, not only was the reference to the drawings and specifications for a limited purpose, but the sub-contract, by the express terms of its eleventh paragraph, placed upon the general contractor (defendant) the obligation to "provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work." Applying this to the facts of the case, defendant agreed to furnish the foundation in such manner that plaintiff might build upon it without delay. This is inconsistent with any implication that the parties intended that delays attributable to the action of the owner should leave plaintiff remediless.

We therefore hold that the general contract was not admissible in evidence against plaintiff, unless for the purpose of showing (if, indeed, it did show) what drawings and specifications were referred to in the sub-contract; and that the rulings of the trial judge holding plaintiff bound by the provisions of the general contract, so as to be obliged to submit to delays resulting from the action of the Government, were erroneous.

Another point that may conveniently be dealt with here is raised by an exception taken to the instruction that "even if there was delay in furnishing granite, there could have been no liability under the sub-contract for such delay, in money, but such a condition was to be remedied by an extension of time for completion, as therein provided." This was clearly erroneous. Paragraph 11 binds defendant to reimburse plaintiff for any loss caused by delay resulting from defendant's failure to provide materials not included in the sub-contract. The

granite was in this category. The trial court misapplied Paragraph 7. The extension of time therein provided for was intended as a dispensation, under given circumstances, of the liability to liquidated damages imposed upon the sub-contractor by Paragraph 6 for failure to complete his work within the time therein limited. The purpose of Paragraph 7 is to relieve the sub-contractor. It cannot properly be construed to deprive him of his right under Paragraph 11 to reimbursement for losses attributable to delays assumed by the general contractor. *Nelson* v. *Pickwick Associated Co.*, 30 Ill. App. 333.

What has been said indicates the disposition that must be made of another exception taken by plaintiff, which was to the instruction that under Paragraph 7 plaintiff was not entitled to recover damages or money compensation from defendant even though it should appear that plaintiff "was obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of the Government of the United States, the Supervising Architect, or his representatives, or by defendant, or by alterations required in the work, since by the provisions of that paragraph the only remedy of plaintiff in such cases is the time allowance therein provided for; unless, however, you should believe from the evidence that the defendant failed to provide labor and materials not included in the sub-contract, in such manner as to delay the material progress of the work."

As we have shown, the failure to furnish a foundation upon which plaintiff's work could be superimposed was a failure to provide "labor and materials not included in this contract," within the meaning of paragraph 11. To furnish the foundation defendant assumed an obligation not conditioned by the question whether it was at fault or whether the delay was involuntary on its part because attributable to a stoppage of work by the owner in the exercise of a right conferred upon it by the principal con-

tract. Defendant of course had notice of the Government's right to suspend the work, and could easily have safeguarded itself against responsibility to the sub-contractor for delays attributable to the exercise of that right by an appropriate modification of Paragraph 11 of the sub-contract, for which presumably an allowance would have been made to the sub-contractor in the form of an increased price for its work or otherwise. This not having been done, Paragraph 11 must be enforced as it is written. It matters not whether plaintiff or its predecessor had notice of the provision of the general contract respecting suspension of the work, since that provision was not incorporated into the sub-contract. It must be presumed that delays attributable to action by the Government were among those intended to be safeguarded by Paragraph 11.

There was testimony as to the profits that plaintiff probably would have gained if the contract had been proceeded with in the ordinary manner. But this question was excluded from the consideration of the jury upon the ground that the profits were contingent and speculative. In this there was error. The testimony was from an experienced witness, and included an estimate of the total cost to plaintiff of the doing of the work called for in the sub-contract. This amounted to $53,012. The contract price was $64,750. The witness testified that a profit of $9,700 would have been made. Whether he intended to say $11,700 was for the jury to determine. No more definite or certain method of estimating the profits could well be adopted, than to deduct from the contract price the probable cost of furnishing the materials and doing the work. *Phila., Wil. & Balt. R. R.* v. *Howard*, 13 How. 307, 344; *Hinckley* v. *Pittsburgh Steel Co.*, 121 U. S. 264, 275; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 549.

Error is assigned to the refusal of the trial judge to give the following instruction:

"If you find that the defendant failed to make payments as called for by the contract, on account of work done by the plaintiff in accordance with the terms of the contract, such failure constitutes a breach of the contract on the part of the defendant, and justified the plaintiff in stopping work under the contract, and entitles it to recovery from the defendant of such damages as may be proper on the evidence and under the instructions which the Court will give you in that regard."

The request was evidently based upon the doctrine illustrated in *Canal Co.* v. *Gordon*, 6 Wall. 561; *Phillips &c. Constr. Co.* v. *Seymour*, 91 U. S. 646, 649; *Norrington* v. *Wright*, 115 U. S. 188, 205. There is a difficulty, however, in applying that doctrine to this case, due to the fact that the contract does not either specify the amount of the advance payments or indicate how they are to be ascertained. The language of Paragraph 12 is that the contract price is to be paid "in monthly payments on account not to exceed in amount 85% of the cost of the work actually erected in the building, provided," etc. There is no clause, such as is frequently found in contracts of this character, that the amounts payable from time to time shall be ascertained and certified by the architect. The language cannot be construed to oblige the general contractor to pay precisely 85% of the cost of the work done; the use of the words "not to exceed" forbids this. The paragraph must receive a reasonable construction, and undoubtedly required the general contractor to make substantial payments monthly, fairly approximating but not exceeding 85% of the cost of the work. But the proviso requiring the sub-contractor to furnish to the general contractor a written requisition did not entitle the sub-contractor to be the sole judge of the amount it was entitled to receive. On the contrary, the provision that the requisition should be submitted "not less than twelve days before payment is required" evidently con-

templated that the general contractor was to be afforded an opportunity to verify the propriety of the demand made. But the evidence fails to show that the requisitions were based upon the cost of the work, or that any clear statement of such cost was submitted with them. As already pointed out, the parties endeavored to arrive at an agreement about unit prices, in order that these might be employed in making up the requisitions. Whether they did so agree the evidence left in dispute. If the agreement was made, it was at the interview of February 2, 1912. A letter is in evidence, written by plaintiff to defendant under date of February 6, saying: "In accordance with your instruction to Mr. Converse we have made our January requisition in the units and unit prices used by the Government engineer. . . . We inclose formal requisition for $9,012.50 due us under contract." But the requisition itself was not introduced. The next and last requisition appears to have been made under date March 9, 1912, and this stated "Amount of work completed to date, $18,237." But such details as were furnished do not seem to bear out this estimate. In the state of the record, we cannot say that there was error in the refusal of the requested instruction.

Error is assigned because of the refusal to instruct the jury as follows:

"In estimating the recovery to which the plaintiff is entitled, if you find he is entitled to recover, you should consider the reasonable expenditures incurred, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract."

Had the requested application of these elements of damage been confined to the case of plaintiff being found entitled to recover upon the theory that the contract was

rightfully terminated by the notice of May 22, 1912, we assume it ought to have been granted. *United States* v. *Behan*, 110 U. S. 338; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 551, 552; *Roehm* v. *Horst*, 178 U. S. 1, 21. But, as already pointed out, other grounds of action were declared upon: (a) defendant's failure to provide granite blocks prior to October 16, 1911; (b) its failure between that date and March 19, 1912, to provide necessary materials and carry on its part of the construction work; and (c) a *quantum meruit* for labor performed and materials furnished. In the event of plaintiff's recovery being based upon these grounds only, some of the elements indicated in the request would not be properly applicable. The form of the request was such that compliance with it might have misled the jury, and hence there was no error in refusing it.

Exceptions were taken to the refusal of certain other instructions requested by plaintiff with the object of basing a recovery of damages, including profits, upon the ground of plaintiff having been prevented by defendant's acts from performing its contract within the time specified or a reasonable extension thereof, or on the ground that defendant's refusal to make payments and other breaches of contract were so unreasonable and inexcusable as to indicate an inability or unwillingness on its part to carry out the contract or to amount to a refusal to perform it in the future, such as to justify plaintiff in stopping work. But these exceptions have not been fully argued, and the requests are perhaps wanting in accuracy; hence, we pass them without consideration.

Judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.